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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York,

Petitioner,

against

LAWRENCE WILLIAM WRIGHT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONSE NOT PRINTED

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Petitioner prays that a writ of certiorari issue to review a portion of the decision of the United States Court of Appeals for the Second Circuit in the case of *Lawrence William Wright* v. *Daniel McMann,* which was decided on March 16, 1972.

Opinions Below

The opinion of the Court of Appeals which petitioner seeks to review is not yet reported. It is filed with this petition as Appendix "A". The decision of the United States District Court for the Northern District of New York, dated July 31, 1970, which was reviewed by the Court of Appeals is reported at 321 F. Supp. 127. This opinion and the orders entered thereon are filed herewith as Appendix "B".

A previous opinion of the Court of Appeals for the Second Circuit reversing a decision of the Northern District Court dismissing the complaint, is reported at 387 F. 2d 519 (1967). A copy of this decision is filed herewith as Appendix "C". The decision of the District Court dismissing the complaint is reported at 257 F. Supp. 739 (1966), and is filed herewith as Appendix "D".

Jurisdiction

The decision of the Court of Appeals was rendered on March 16, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals properly affirmed an award of compensatory damages against petitioner McMann in a suit brought by respondent Wright pursuant to Section 1983 of the Federal Civil Rights Act for alleged unconstitutional treatment at a prison at which petitioner was the warden?

Statutes Involved

42 U.S.C. § 1983

"Civil Action for Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proceeding for redress."

Statement of the Case

A. Procedural Background

Respondent Lawrence Wright is an inmate of the New York State correctional system who is serving a sentence of one day to life imprisonment for the crime of sodomy. Respondent instituted this Civil Rights Action pursuant to 42 U.S.C. § 1983 in the Northern District of New York, in March, 1966, while he was incarcerated at the Clinton Correctional Facility. The gravamen of Wright's complaint was that his federal constitutional rights were violated by petitioner McMann and by other prison personnel while he was confined for two periods in the segregation unit of Clinton Correctional Facility, during 1965 and 1966. Wright alleged that he was beaten by the guards, deprived of legal materials and forced to endure freezing temperatures and filthy conditions while remaining nude in a cell that was stripped of all furnishings.

The District Court (BRENNAN, D.J.) dismissed the complaint on August 31, 1966. It held that Wright's case did not fall within the exception to the general rule that federal courts would not interfere in cases involving the internal management of state prisons. It further held that Wright's grievances concerning the conditions of his confinement and the procedures used to impose discipline on him were properly the subject of a suit in the state courts in the first instance. See 257 F. Supp. 739 (Appendix "D").

The decision of the District Court was reversed by the Court of Appeals for the Second Circuit on December 19, 1967. The Court of Appeals held that the absence of injunctive relief in the New York courts, and the absence of a complex scheme of state law, prevented the Court from dismissing the action under the exhaustion of state remedies doctrine or the absention doctrine. The Court further noted that if the conditions alleged by Wright were true,

they would have constituted cruel and unusual punishment in violation of the Eighth Amendment. Accordingly, the Court reversed the dismissal of the complaint and remanded the case for further proceedings in the District Court. See 387 F. 2d 519 (Appendix "C").

On August 29, 1968 the District Court (FOLEY, D.J.), consolidated Wright's case with the case of another Clinton inmate, Robert Mosher, who had filed a lawsuit raising similar constitutional claims. The consolidated cases were brought to trial in October, 1968, during which the District Court (sitting without a jury), heard the testimony of 26 witnesses for a period of seven days.

On July 31, 1970 the District Court rendered a lengthy decision in which it awarded respondent Wright $1500 in compensatory damages against petitioner McMann, and issued certain injunctive relief on Wright's behalf. On August 19, 1970 the District Court embodied this relief in an unreported decree. The relief granted was as follows:

(a) Petitioner and his co-defendant, Superintendent J. Edwin LaVallee,* were enjoined from using segregated confinement until they promulgated rules and regulations ensuring that segregation cell facilities were adequate to safeguard the health of occupants, that heat and ventilation were sufficient, that nudity could not be enforced solely as a disciplinary measure, and that provisions be made for surprise inspection visits by trained supervisory personnel;

(b) Petitioner and Superintendent LaVallee were required to promulgate, and submit for the District Court's approval, rules and regulations governing procedures of prison disciplinary hearings, and rules and regulations governing the condition of psychiatric observation cells as

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* J. Edwin LaVallee replaced Daniel McMann as the Superintendent of Clinton Correctional Facility in January, 1968.

well as the procedures used to determine whether an inmate should be confined to such a cell;

(c) As to Wright and his co-plaintiff Mosher, petitioner and Superintendent LaVallee were enjoined from placing them in segregation or depriving them of good behavior allowances without affording them prior notice of charges, the right to "appropriate" representation at a disciplinary hearing, the right to call witnesses and to have decisions reviewed administratively and the right to have definite sentences imposed for segregated confinement.

(d) As to plaintiff Mosher, Superintendent LaVallee was ordered not to "censor or interfere in any way with any correspondence" between Mosher and his attorney, and ordered to restore 616 days of good behavior allowance which Mosher lost while in segregation.

(e) Petitioner and Superintendent LaVallee were also enjoined from placing Wright or Mosher in psychiatric observation cells for disciplinary purposes or without psychiatric justification, and from prohibiting inmates to give legal advice or assistance to each other subject to reasonable regulations. (See decrees of August 19, 1970 in Appendix "B").

On March 16, 1972 the decision of the District Court was affirmed in part, reversed in part and modified in part by the Court of Appeals for the Second Circuit. The Court of Appeals, following its own decision in *Sostre* v. *McGinnis*, 442 F. 2d 178 (1971), cert. denied sub nom. *Sostre* v. *Oswald*, 404 U.S. 1049 (1972), and *Oswald* v. *Sostre*, 405 U.S. 978 (1972), reversed the requirement that prison officials use trial-type procedures in sending inmates to segregation units or psychiatric observation cells, and reversed the requirement that petitioner and Superintendent LaVallee submit rules and regulations for the District Court's approval. The Court of Appeals modified the portion of the District Court's decision which prohiibted the prison officials from censoring Mosher's correspondence with his

attorney, and held that the prison officials could open and read such correspondence but could not interfere with it absent a clear abuse of access to the mails.

With respect to the damage award, which is the subject of the instant petition, the Court of Appeals affirmed the award to Wright of $1500 compensatory damages against petitioner McMann. The Court of Appeals noted that although the District Court did not make specific findings that the Warden had imposed the deprivations which the District Court found to be unconstitutional or had actual knowledge of them, there was evidence in the record for the Court of Appeals to conclude that petitioner actually knew of the conditions in the Clinton segregation unit when Wright was confined there. In addition the Court held that petitioner was charged with such knowledge because the New York Correction Law and the Employees Rule Book of the New York State Department of Correctional Services, entrusted the Warden with the management and supervision of the prison and required him to keep daily records of the punishments inflicted on prisoners.

In a concurring opinion, Circuit Judge Oakes stated that he would favor judicial intervention to establish minimal correctional standards, but he did not believe that the instant case was an appropriate vehicle for such action. He also expressed the view that a re-examination of the Court's position on mail censorship would be appropriate in a later case, but not the instant case.

Circuit Judge Hays, dissenting in part, stated that he opposed the restoration of good behavior allowance to plaintiff Mosher because Mosher was not subjected to extreme physical abuse and was not punished for engaging in constitutionally protected activities. With respect to the damage award against petitioner McMann, Judge Hays disagreed with the affirmance of that award by the majority of the Court. Judge Hays stated that the argument that petitioner was charged with knowledge because of his

statutory duties, advanced a theory of vicarious liability which was inappropriate in civil rights cases.

B. Factual Background

At his trial in the Northern District of New York in 1968, respondent Wright gave the following testimony concerning the periods of segregated confinement for which the District Court awarded compensatory damages. On February 18, 1965 Wright was charged with violating prison rules by distributing information about inmates which he had obtained from hospital files. Wright admitted to the Deputy Warden that he was guilty of the charge, and was sent to the segregation unit until further orders.

Wright testified that he was placed nude in a cell in the segregation unit, and that the cell was stripped of furnishings. He said that the cell was dusty and dirty, and reeked with the stench of urine and excrement. He said that there was one toilet, which was encrusted with filth and slime, one sink with cold running water, and no furniture or bed or mattress or cleaning implements. He said the cell was seven feet wide, eight or nine feet long, nine feet high, and was fronted with bars, but did not have a light. He said he was able to talk to other inmates if they were housed next door.

Wright stated that he was forced to sleep on the concrete floor, and that his body became numb from cold air coming through the windows and from the absence of heat in the radiator. He said he was awakened at 7:30 A.M. and forced to stand at attention at the bars of his cell every time an officer passed by, until 10 P.M.

Wright testified that he could not receive his Bible or attend religious services for the 33-day period that he was confined in a strip cell. He said that he did not receive any legal materials until he had been in the strip cell for six days, and then received some law books and some legal

pads and pens and pencils. He said that on March 26, 1965 petitioner McMann permitted him to have the remainder of his legal materials when he left the strip cell.

Wright stated that while he was in the strip cell he suffered from dizziness, nausea, blackouts and vomiting, and experienced swelling in his legs and feet. He said that one of the prison physicians denied his request for medical care, and another prison physician merely gave him two aspirins. He said he was not taken to see a dentist until he was removed from the strip cell, and that a physician did not make daily rounds in segregation in 1965.

Wright testified that he was not permitted to have his glasses when he was placed in the strip cell, and that he had to do without them for one and a half weeks, although he was still able to write. He said petitioner McMann granted him permission to have his glasses on request.

Wright stated that he was kept nude in the strip cell for the first eleven days, and remained there until March 26, 1965, when he was transferred to another section of the segregation unit where he received more privileges. He said he was sent to a psychiatric observation cell in April, 1965 because of some difficulties he was having with another inmate, and remained there for three and one half days. He described the cell as having a solid door with a six inch by six inch panel cut out of it to enable outsiders to look in. He said the cell was a regular room with a window in the back and the window was covered by a metal screen, and could be opened by an officer who had a key to the screen. A recessed light was in the ceiling.

The dimensions of the psychiatric observation cell were approximately nine or ten feet in length and eight or nine feet in width. Wright said that the cell had no furnishings or toilet or sink, and that he was given a two inch mat to sleep on at night and had to ask the officers to es-

cort him to the bathroom. He said that he was not given a toothbrush or toothpaste or anything for his sanitary needs, and that he suffered from the cold when the windows were left open and experienced blackouts and dizzy spells. He said a ceiling light was kept on during the night but not during the day.

Wright said that he saw the prison psychiatrist and other doctors on a daily basis while he was in the observation cell, and then was returned to the segregation unit.

In February, 1966 Wright was brought up on charges again, as a result of an altercation with the guards. He said that the Deputy Warden sentenced him to segregation until further orders, and that the guards who brought him to segregation threatened and abused him. He said that when he arrived at the segregation unit, he was forced to remove all of his clothing and placed in a strip cell.

Wright said that the cell was barren and contained no lighting facility or cleaning implements or anything to sleep on. He said that there was debris on the floor, including hair and particles of clothing, and that the toilet and sink were encrusted with slime and other residue. The cell was the same size as the strip cell he had previously been placed in.

Wright stated that he was given all of his legal materials two and a half days after he arrived in segregation but his request for a Bible and prayer book were denied. He said his clothing was not returned to him and he was not given underwear or a covering. He said he remained in the strip cell for 21 days from February 10, 1966 to March 3, 1966, when he was released to the general population after filing the complaint in the instant case. He said that during his confinement he was threatened by the officers for instituting a legal action.

Wright testified that he was sent to segregation for a third time in 1967, and that conditions there had vastly

improved. He said he was given cleaning implements, clothing and bedding, and some hygienic implements, but that there were some insects present and his mattress and pillow were dirty. He said he remained in segregation in 1967 for 30 days.

With regard to his three periods of segregated confinement, Wright testified to the following loss of privileges. He said there were no exercise privileges, no earphones, no movies, no opportunity to earn money or to earn good time credit, no commissary purchases, except legal materials, and no personal letters except a Sunday letterhead. He said he was also denied therapeutic and educational programs and religious services. He said that the food was wholesome, but the proportions were too small and he received desserts only occasionally and rarely received fresh fruits. He said he lost sixteen or seventeen pounds, although he acknowledged he never complained about the food.

Wright also stated that there was no counselling program or psychiatric care in the segregation unit. He said the segregation unit was in a separate box-type building surrounded by a ten foot steel fence, and had no connection with the observation cells in the prison hospital. The interior of the building contained an exercise yard, and the individual cells opened into small exercise patios behind them.

Wright further testified that during his 1965 confinement in the strip cell he was given cotton underwear and toilet paper after eleven days, but that prior to that he suffered from the cold and had to use his hands to clean himself. He acknowledged that the radiator in his cell gave off some warmth and that during the day the temperature would be between 80 and 85 degrees, but that the temperature would drop in the late afternoon when the officers opened the windows to allow ventilation.

Wright stated that he wrote interview slips to prison personnel complaining about conditions in segregation, and also wrote to the Commissioner of Correction, the FBI and the state courts. He said he did not hear from petitioner McMann, but two FBI agents interviewed him in 1965 and 1966, and he told them about the conditions he endured. He said that both times the Department of Justice informed him that no action would be taken.

Wright said that many officers made rounds in segregation and saw him in the nude, and he complained to them. He said that the Deputy Warden told him he would do something about his complaints, but also told him the nudity was part of the punishment and that his length of stay in segregation was up to him.

Wright stated that the Catholic Chaplain visited him in segregation in 1965, and visited him again in 1966 and administered ashes. He also said that in 1965 and 1966 he was able to obtain legal materials from the commissary.

Wright also testified that in the strip cell his body developed a stench because he could not wash himself, and that he had to use his hands after using the toilet. He said he would place his food on the floor, and sometimes had to eat after going to the bathroom.

In addition to Wright, ten other Clinton inmates testified about the conditions in the segregation unit, claiming that the cells were dirty and that they did not contain cleaning implements and other necessary articles.

On behalf of the defendant prison officials, two Deputy Wardens, who were in charge of the segregation unit from 1960 to 1965, and from 1965 to the present, testified about the practices in segregation. They denied that the cells were in the condition stated by Wright and the other inmates, and said that many implements and furnishings were removed from the cells for safety reasons. One Deputy Warden stated that petitioner McMann had dele-

gated to him the power of imposing disciplinary punishments, and had informed him in no uncertain terms that officers were not to use profanity or to lay hands on inmates. The other Deputy Warden stated that in 1966 he ordered Wright to be kept nude for a week, and then rescinded the order.

In addition to the Deputy Wardens, six segregation officers testified that the inmates in segregation were given clothing and cleaning implements, and were able to keep their cells in clean conditions. Another officer testified that the prison physicians made daily rounds in segregation.

Petitioner McMann testified that he was the Warden of Clinton Correctional Facility from January, 1964 to January, 1968. He said he delegated responsibility to his Deputy Wardens for disciplinary matters, and that in March, 1965 he directed the Deputy Warden to give segregation inmates trousers and shirts, in addition to long underwear. He said that in 1966 he directed the Deputy Warden not to place inmates in strip cells in the nude, but to give them long underwear and socks, and a mattress and blanket at night. He said that prior to this time he had believed to the best of his knowledge that inmates were receiving a mattress or a blanket.

McMann stated that he never saw filthy conditions at Clinton, and did not permit them. He said it would have violated the customary rules of the institution if officers failed to give inmates implements to clean themselves or toilet articles. McMann said that early in 1966 he discovered that Wright had been placed nude in a strip cell for a period of time, and he directed the Deputy Warden that in the future no man would be placed nude in the strip cell.

Subsequent to the trial in 1968 and the District Court's decision in 1970, but prior to the decision of the Court of

Appeals in 1972, the New York State Department of Correctional Services promulgated extensive regulations to prevent any cell from being maintained in a degrading or unhealthy condition, and to insure that all inmates received adequate clothing, furnishings and hygienic implements. In addition the New York Legislature amended the Correction Law to provide that segregation inmates were to receive suitable clothing, sufficient quantities of wholesome food, adequate sanitary and other conditions required for health, and access to a physician on a daily basis after the first 24 hours. These changes were noted by the Court of Appeals in reversing the portion of the District Court's order which required the defendant prison officials to submit rules and regulations for the District Court's approval.

Reasons for Granting the Writ

The affirmance of the damage award against petitioner McMann by the Court of Appeals was tantamount to holding him vicariously liable under the Civil Rights Act since there was no evidence that petitioner personally imposed the deprivations on respondent which the District Court found to be unconstitutional. Such vicarious liability is unsound and has been rejected by other Courts of Appeal.

In its decision awarding compensatory damages to respondent Wright, the District Court made specific findings that Wright was kept nude in a strip cell for disciplinary purposes, in 1965 and in 1966. The District Court also found that Wright was deprived of hygienic implements, and that these things were kept on the window sills outside the strip cells, only to be handed to the inmates by the guards on request. The District Court further found that part of the strip cell treatment was to keep the cells in not too clean a condition, and that at times the temperature was cold to an inhumane degree, and caused extreme discomfort to the inmates.

While it rejected a defense of good faith or probable cause, and noted that there was a design to avoid written rule-making and to put the inmates in the hands of guards under unsanitary conditions, to make the inmates subservient, the District Court made no specific findings that petitioner McMann had personally imposed the deprivations on respondent Wright which were the basis of the damage award. Indeed, the District Court noted that Warden McMann had changed certain customs of nudity and cell conditions after he found out about Wright, and had made major corrections in the segregation unit when certain conditions came to his attention. In addition, the District Judge declined to award punitive damages against petitioner McMann because there was not enough evidence to find deliberateness or recklessness on McMann's part. Wright's testimony also showed that McMann granted him permission to have his eyeglasses, while he was in the strip cell in 1965, and granted him permission to have the remainder of his legal materials when he left the strip cell in March, 1965.

In affirming the damage award, the Court of Appeals stated that although the District Court had made no findings with respect to petitioner's actual knowledge of Wright's situation, and that a remand to the District Court for more specific findings would not be inappropriate, there was "abundant" evidence in the record from which the Court of Appeals could conclude that McMann actually knew of the conditions which Wright endured. This evidence consisted of McMann's answer to Wright's complaint, which admitted that strip cells were used in segregation and contained only bare necessities; Wright's testimony that during an interview with FBI agents, one of the agents said he had spoken to the warden; McMann's having returned Wright's eyeglasses and legal materials on Wright's complaint; and McMann's having read and initialed a memorandum to the Commissioner in which Wright described the conditions he endured in the strip cell.

The Court of Appeals did not base its decision solely on this ground, however, but went on to hold that McMann was chargeable with knowledge as a result of his statutory and administrative responsibilities in running the institution:

> "Furthermore, [McMann] was charged with having such knowledge. Ultimate responsibility for the operation of the segregation cells was his, as is made clear from trial testimony, the Employees Rule Book of the New York State Department of Correction then in effect, and section 18, N.Y. Correction Law, McKinney's Consol. Laws c. 44 (1968), as amended L. 1970, c. 476, § 4 (1971 Supp.). Furthermore, section 114-a of the New York Correction Law required that the warden
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> shall cause to be kept a daily record of the proceedings of the prison, in which shall be entered a note . . . of every punishment inflicted on a prisoner, the nature and amount thereof and by whom it was inflicted, and also a memorandum of every well-founded complaint made by any prisoner of bad or insufficient food, want of clothing, or cruel or unjust treatment by a guard; . . ." (Appendix "A" at 17a-18a.) at 107).

The Court of Appeals concluded that because petitioner knew or should have known of the conditions in the segregation cells, and was ultimately responsible for permitting such conditions to exist, petitioner should be liable in damages to respondent Wright and should not be permitted to shift his responsibility to subordinate employees.

While we understand the reluctance of the Court of Appeals to deny damages to a prisoner who has suffered what the District Court found to be violation of his rights under the Eighth Amendment, we submit that this affirmance of the damage award by the Court of Appeals was tantamount to holding petitioner vicariously liable for the acts of subordinate employees. We believe that this holding represents an unwarranted extension of liability under

the Civil Rights Act, and presents an issue which should be resolved by this Court in view of a conflict in the decisions of other Circuit Courts of Appeal.

In *Hesselgesser* v. *Reilly*, 440 F. 2d 901 (7th Cir. 1971), the Court of Appeals for the Ninth Circuit held that a sheriff was liable under 42 U.S.C. § 1983 for the actions of his deputy because of state statutes which specifically imposed liability on the sheriff for the negligence and misconduct of his subordinates. However, in discussing the general principles of liability under the Civil Rights Act the Court said:

> "The Civil Rights Act does not itself specifically establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil rights violation. The applicable section, 42 U.S.C. § 1983, speaks only of '[e]very person who * * * subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights * * *.' Thus if one who did not participate in such violation is to be held liable for such civil rights violation of another on principles of vicarious liability, or by reason of statutory responsibility, it must be because: (1) the Civil Rights Act gives recognition to the laws of the states pertaining to such liability and, (2) the laws of the particular state where the action arose *create such liability.*" (440 F. 2d at 902-03; emphasis added.)

In the instant case the Correction Law and the Employees Rule Book of the then Department of Correction empowered the warden of a state prison to direct and define the work of subordinate personnel, to discipline errant employees and to promote the rehabilitation and safety of inmates. However, none of these statutory or administrative directives established any personal liability on the part of the warden for the misconduct of subordinate personnel, who are civil service employees of the state and not the employees of the warden. Cf. *Sanberg* v. *Daley*, 306

F. Supp. 277, 278 (N.D. Ill. 1969); *Salazar* v. *Dowd*, 256 F. Supp. 220 (D. Colo. 1966). Indeed, under the then applicable state statutes, respondent's claims for mistreatment in the state courts would have had to have been brought in the Court of Claims as a claim against the State of New York, and not against the Warden personally. See former Section 24, New York Correction Law, repealed L. 1971, c. 1104.

In *Adams* v. *Pate*, 445 F. 2d 105 (7th Cir. 1971), the Court of Appeals affirmed the dismissal of a complaint brought by an inmate against the warden, pursuant to 42 U.S.C. § 1983, where the inmate alleged that he had been beaten by guards and had been confined in segregation in violation of the Eighth Amendment and the Due Process Clause. In denying relief the Court noted: "Where monetary damages, as distinguished from equitable relief, is sought under the provisions of the Civil Rights Act the doctrine of respondeat superior does not apply; personal involvement of the defendant is required. Cf. Schnell v. City of Chicago, 7 Cir. 407 F. 2d 1084, 1086." (445 F. 2d at 107, n. 2). The Court further stated, in terms relevant to the facts in the instant case:

> "Insofar as Adams' complaint seeks recovery for the alleged beatings it is wholly insufficient to state a claim against the defendant [warden]. It totally fails to allege overt acts on the part of Warden Pate or that the alleged beatings were administered at the direction of the Warden or with his knowledge and consent. All the complaint alleges in this respect is that the plaintiff's mother, after a visit to him at the prison, informed Warden Pate of the beatings at the prison but he did nothing to stop them." (445 F. 2d at 107).

In *Kish* v. *County of Milwaukee*, 441 F. 2d 901 (7th Cir. 1971), two inmates of a county jail brought suit under the Civil Rights Act against the county itself, the County Board of Supervisors and the sheriff of the county, al-

leging that these officials had failed to insure plaintiffs' safety from physical and homosexual assaults. In affirming the denial of relief by the District Court, the Court of Appeals rejected numerous contentions of what the defendant sheriff could have done to prevent homosexual assaults, and noted that the sheriff had made some efforts to relieve overcrowding, which was found by the District Court to be the true cause of the plaintiffs' difficulties. Similarly, in the instant case, the District Court made a specific finding that petitioner McMann, to his credit, had made corrections in the segregation unit when certain conditions came to his attention, and had changed certain customs of nudity and cell conditions when he found out about Wright.

While the Court of Appeals for the Seventh Circuit appears to be entirely opposed to the imposition of vicarious liability under the Civil Rights Act, and the Court of Appeals for the Ninth Circuit appears to be opposed to such liability unless it is found in local law, two other Courts of Appeal appear to have taken a different view of this issue.

In *Roberts* v. *Williams,* 456 F. 2d 819 (5th Cir. 1971), cert. denied sub nom. *Roberts* v. *Smith,* 404 U.S. 866 (1971), the Court of Appeals affirmed a damage award under the Civil Rights Act against a prison superintendent who had failed to give proper instruction to a trusty in the handling of deadly weapons. The District Court had found that because of the superintendent's failure to give such instruction in the use of a firearm, and because of the trusty's negligence in handling a firearm, the plaintiff was needlessly and permanently injured when the trusty accidently discharged a shotgun in plaintiff's face. While the Court of Appeals noted that callous indifference to suffering at the management level, through sustained knowing maintenance of bad practices and customs, could result in a violation of the Eighth Amendment, it declined to rule on the issue of *respondeat superior* because it believed that the Superintendent was personally

liable for his own negligence and for his failure to abide by his state law duty to provide proper care for the prisoners in his custody. However, the Court intimated that the rejection of *respondeat superior* by the District Court may not have been a correct interpretation of Mississippi law or of the Court of Appeals decision relied upon by the District Judge. (See 456 F. 2d at 822).

In *Carter* v. *Carlson,* 447 F. 2d 358 (D.C. Cir. 1971), the Court of Appeals grappled with the difficult issue of whether supervisory police officers and the District of Columbia itself could be held liable for the misconduct of a police officer who had beaten the plaintiff with brass knuckles. In reversing the decision of the District Court which had dismissed the complaint, the Court of Appeals stated that under *Roberts* v. *Williams, supra,* the supervisory police officers could be held liable for damages under the Civil Rights Act if they had been negligent in training the policeman who injured plaintiff, and if this negligence had resulted in a deprivation of plaintiff's constitutional rights. In addition, the Court held that the District of Columbia could be directly or vicariously liable for the misconduct of its employees, under 42 U.S.C. § 1983, in spite of the decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961), exempting the City of Chicago from such liability. The Court reasoned that *Monroe* was distinguishable because it involved a municipality that was exempted from liability by state law.

These decisions in four other Circuit Courts of Appeal indicate the need for a resolution of the issues raised in the instant case. While the Court below initially predicated its affirmance of the damage award against petitioner on the ground of petitioner's supposed "knowledge" of Wright's mistreatment, it then broadened its ruling to hold petitioner liable on the ground of his statutory and administrative duties as warden of the prison. In so doing the Court below has brought into focus two issues under the Civil Rights Act which require clarification by this Court: (1) the extent to which supervisory

personnel by virtue of their statutory and administrative duties, should be held vicariously liable for the misconduct of subordinate employees; (2) the extent to which supervisory personnel, by virtue of their alleged failure to give adequate supervision or training, should be held personally liable for the misconduct of subordinate personnel. We believe that such elaboration would be particularly appropriate in view of this Court's recent decisions concerning jurisdiction under 42 U.S.C. § 1983 in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971), and *Haines* v. *Kerner*, 404 U.S. 519 (1972).

In addition, petitioner contends that the Court below did not correctly decide the issues of personal and vicarious liability on the record in this case. As we noted before, the District Court made no findings of fact concerning petitioner's actual knowledge of the deprivations respondent endured, and the Court of Appeals made such a determination based on its own reading of the record. However, of the items in the record which the Court of Appeals relied upon to find actual knowledge, only one (Wright's letter to the Commissioner in 1966, which petitioner read and initialed) provided direct proof that petitioner knew the details of the treatment Wright was receiving from the segregation officers. It was after this letter, and Wright's complaint in the District Court, that petitioner issued a directive to the Deputy Warden to end nudity in the strip cells.

Similarly, although the Court below charged petitioner with knowledge of Wright's situation because of petitioner's statutory and administrative duty to supervise the prison in which Wright was confined, the Court ignored the fact that New York law (unlike the state laws noted in the cases above) did not impose on petitioner any personal liability for the acts of subordinate civil service employees. In addition, departmental rules and policies provided that the Deputy Warden was in charge of disciplinary matters and in charge of supervising the operation of segregation units. One Deputy Warden testified at trial that in 1966 Wright was kept nude in a strip cell at his specific order.

In sum, petitioner prays that this Court will review both the broad issues and the specific issues raised by the decision below, and raised by the apparent conflict in the decisions of other Courts of Appeal concerning liability under 42 U.S.C. § 1983. Petitioner believes that the imposition of vicarious liability or "supervisory" liability under the Civil Rights Act, where no such liability exists under state law, will impede public officials in their work by subjecting them to heavy personal damages for acts of subordinate personnel who are not their employees, and cannot be hired or fired by them. Cf. *Morgan* v. *Willingham*, 424 F. 2d 200, 201 (10th Cir. 1970). In the instant case, petitioner, who did not direct any of the deprivations that were imposed on respondent by the segregation guards, and who took some steps to correct them, is being required solely to pay the damage award out of his own pocket.

CONCLUSION

The instant petition for certiorari should be granted to review the decision of the Court of Appeals for the Second Circuit affirming the award of compensatory damages against petitioner.

Dated: New York, New York, June 12, 1972

Respectfully submitted,

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JUN 14 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

DANIEL MCMANN, Warden of Clinton Prison
Dannemora, New York,

Petitioner,

against

LAWRENCE WILLIAM WRIGHT,

Respondent.

APPENDIX

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, dated March 16, 1972.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 95, 96—September Term, 1971.

(Argued October 27, 1971 Decided March 16, 1972.)

Docket Nos. 35572, 35573

LAWRENCE WILLIAM WRIGHT,

Plaintiff-Appellee,

—v.—

DANIEL MCMANN, Warden of Clinton Prison,

Defendant-Appellant.

UNITED STATES OF AMERICA *ex rel.*
ROBERT MOSHER,

Petitioner-Appellee,

—v.—

J. EDWIN LAVALLEE, Superintendent of Clinton Correctional Facility,

Respondent-Appellant.

Before:

LUMBARD, HAYS and OAKES,

Circuit Judges.

Appeal from the decision and orders of the United States District Court for the Northern District of New York,

Appendix A.

James T. Foley, *Judge,* granting plaintiffs' various requests for equitable and legal relief under 42 U.S.C. § 1983.

Orders affirmed, modified, and reversed.

BETTY D. FRIEDLANDER, Waverly, New York (Herman Schwartz, Buffalo, New York, and William C. Scott, Jr., Portland, Oregon, on the brief), *for Appellee Lawrence William Wright.*

WILLIAM BENNETT TURNER, San Francisco, California (Jack Greenberg, Stanley A. Bass, New York, New York, and Alice Daniels, San Francisco, California, on the brief), *for Appellee Robert Mosher.*

HILLEL HOFFMAN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, and Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Defendants-Appellants.*

LUMBARD, *Circuit Judge:*

Lawrence William Wright in March 1966 brought suit under the Civil Rights Act, 42 U.S.C. § 1983, against appellant McMann in the Northern District of New York. Wright's *pro se* complaint alleged that Warden McMann and other prison officials at the Clinton Correctional Facility had deprived him of his constitutional rights during two periods of solitary confinement. The district court dismissed the complaint on the alternate grounds that it was insufficient to show any constitutional violation and that it should have been brought first in the state courts. The court reversed, *Wright* v. *McMann,* 387 F.2d 519 (2d Cir. 1967), finding that neither the doctrine of exhaustion

state remedies nor the doctrine of federal abstention was properly invoked.[1] This court also noted that Wright's claims, if true, were sufficient to make out a violation of the Eight Amendment's prohibition against cruel and unusual punishment. Remanded to the district court, Wright's cause came on for trial in October 1968.

Consolidated with Wright's action was the Civil Rights suit of appellee Robert Mosher, commenced in May 1967 against Warden McMann, for whom appellant LaVallee was substituted when the latter became Superintendent of Clinton in January 1968. Mosher's complaint tracked Wright's insofar as constitutional violations stemming from segregated confinement were alleged: unlike Wright, Mosher pursued only injunctive relief and did not claim damages.

Judge Foley, sitting without a jury, heard testimony of appellees, appellants, and their respective witnesses[2] for seven days. He rendered decision on July 31, 1970, reported at 321 F. Supp. 127, and entered two orders, on August 19, 1970 (unreported), granting relief along the following lines:

(a) Appellants were enjoined from all use of segregation until they promulgated rules and regulations ensuring, among other things, that segregation cell facilities were adequate to safeguard the health of occupants, that heat

[1] The propriety of invoking these doctrines in state prisoner §1983 cases was recently considered and rejected by a majority of the judges of this Circuit sitting *in banc*. *Rodriguez* v. *McGinnis*, *United States ex rel. Katzoff* v. *McGinnis*, *Kritsky* v. *McGinnis*, Second Circuit, decided Jan. 25, 1972, slip op. p. 1527. Disposition of the instant case was accordingly postponed while that issue was under consideration.

[2] In addition to Wright, Mosher, McMann, and LaVallee, nine other inmates and eleven other correctional officers presently or previously at Clinton Correctional Facility, Dannemora, New York, testified. In all, twenty-six witnesses testified, filling nearly 1600 pages of transcript.

and ventilation were sufficient that nudity could not be enforced solely as a disciplinary measure, and that provisions be made for "surprise" inspection visits by trained supervisory personnel.

(b) Appellants were further required to promulgate, and submit for the district court's approval, rules and regulations governing procedures of prison disciplinary hearings, and rules and regulations governing the condition of psychiatric observation cells as well as the procedures used to determine whether an inmate should be confined to such a cell.

(c) As to Wright and Mosher specifically, appellants were enjoined from placing either in segregated confinement or otherwise punishing them so as to deprive them of "good time" or their ability to earn "good time" without affording them, *inter alia,* the following: prior notice of the charge for which segregation might be suitable punishment, the right to "appropriate" representation at a hearing where Wright or Mosher could present his version of the facts giving rise to the charge, and the right to call witnesses and to have made a record of the proceedings.[3]

(d) As to Mosher alone, appellants were ordered not to "censor or interfere in any way with any correspondence" between him and his attorney. Judge Foley also ordered restoration of 616 days of Mosher's "good time," 440 of which had been revoked in prison disciplinary proceedings during his confinement to segregation and 176 of which he was prevented from earning because of such confinement.

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[3] If at such a hearing the decision was adverse to Wright or Mosher, and segregation was deemed suitable, it could not be imposed "UFO" (until further orders) but instead must provide for a determinate length of confinement. The reasons for such a decision were required to be reported, and the decision to be reviewed by the warden. A further, formal means of administrative appeal was also required.

(e) Wright was awarded $1500.00 compensatory damages for his illegal confinement to segregation as against appellant McMann.

(f) Appellants were also enjoined from confining Wright or Mosher in psychiatric obesrvation cells for disciplinary purposes or without psychiatric justification, and from prohibiting inmates to give legal advice or assistance to each other subject to reasonable regulation.

For the reasons set out below, we reverse those portions of the district court's orders requiring trial-type procedures (para. c) or the promulgation of rules and regulations either regarding trial-type procedures in prison disciplinary hearings (para. b) or governing the use and facilities of segregation or psychiatric observation cells (para. a); we modify that portion of the order enjoining appellants from censoring or interfering in any way with any correspondence between Mosher and his attorney (para. d); and we affirm those portions of the orders restoring Mosher's "good time" and awarding damages to Wright (para. d and e). It should be without saying that, where we have reversed the requirements that appellants promulgate rules and regulations, appellants are under no obligation to make submissions of any kind for the district court's approval. Appellants do not contest, and we find warranted, and affirm, those portions of the orders below prohibiting appellants from confining Wright or Mosher to psychiatric observation cells for disciplinary purposes or without psychiatric justification, and prohibiting appellants from denying inmates the opportunity to render legal advice or assistance to each other subject to reasonable regulation (para. f).

In reversing the original dismissal of Wright's cause of action this court noted that there would be "no hesitation in holding that the debasing conditions to which Wright claims to have been subjected . . . would, if established,

constitute cruel and unusual punishment in violation of th Eighth Amendment." *Wright* v. *McMann*, 387 F.2d at 52 Indeed, most of Wright's allegations were subsequentl established. Judge Foley found, and appellants do not her contest, that for eleven days in 1965 and 21 days in 196 Wright was kept, sometimes or always completely naked, in a strip cell"—that is, a cell barren of all furnishing sav a toilet and washbowl. Nudity was enforced to demean an punish the inmate. No bedding of any kind was provided forcing Wright to sleep on the concrete floor. His eye glasses were taken from him, and he was provided neithe soap, towels, nor toilet paper. Privileges were at a mini mum during confinement to the strip cells, inmates so con fined were required to jump to attention at the cell doo whenever a guard passed, and the temperature during th night was sufficiently cold to cause extreme discomfort t the inmate sleeping naked on the concrete floor withou even a blanket. No program existed for cleansing the cel from the time one inmate left until another arrived, an provisions for occupant-inmates to scour the cell were in adequate. The psychiatric observation cell had neithe toilet nor washbowl: occupants were required to coordinat trips to the bathroom with the convenience of the guards The practice at that time was "to put the rebellious prisoner in the hands of the guards under unsanitary con ditions that would make him subservient and break him down," 321 F. Supp. at 143.

As to Mosher, Judge Foley found that he was confined to segregation for five months in 1967, that two months after his return to general population he was again placed

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[4] Both the transcript and the lower court opinion indicate alternately that Wright was nude either for the duration or for substantial periods but not always, e.g., 321 F. Supp. at 140, 141.

in segreation, where he spent a year,[8] for the same violation which caused him to be sent to segregation the first time, *viz.*, refusal to sign a "safety sheet" detailing safety rules to be observed in prison workshops. Judge Foley found Mosher sincere in his belief that his signature on the sheet would constitute a waiver of prison liability were he to be injured in the shop. Segregation cell conditions were considerably less abhorrent than when Wright was in occupancy.

These findings of the district court are amply supported by the record and are not disputed on appeal. The parties have joined issue primarily with respect to the various forms of relief granted by the district court.

Our disposition is largely controlled by *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), decided subsequent to the lower court ruling herein. In *Sostre* this court sitting *in banc* considered, *inter alia*, the delicate balance between the due process rights of state prisoners charged with infractions of prison rules and the necessity for the maintenance of prison order and security. The district court's order that trial-type procedures accompany prison disciplinary hearings was reversed, in the main because the federal courts are inappropriate to the task of weighing the effect of elaborate procedural safeguards on either the outcome of a particular hearing or prison morale in general, *id.* at 194-99. *Sostre* thus mandates reversal of Judge Foley's requirement that appellants promulgate and adhere to rules and regulations regarding either trial-type procedures in prison disciplinary hearings or procedures to be used in determining whether an inmate should be confined to a psychiatric observation cell. *Sostre* also indicated, however, that a "minimally fair and rational" inquiry would require

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[8] His lengthy confinement resulted in part from infractions committed while he was in segregation. *See* note 7 *infra*.

observation of "such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relevant facts—at least in cases of substantial discipline." *Id.* at 198, 203. In short, because we are loathe to graft onto state prison disciplinary hearings a broad panoply of procedural requirements does not mean that rudimentary due process can be ignored at the caprice of prison officials.[6]

We think that *Sostre* also requires us to reverse the lower court's order prohibiting appellants from confining any inmate to segregation or psychiatric observation cells until rules and regulations regarding conditions of such cells have been promulgated. Little purpose would be served by yet another reiteration of the deplorable segregation cell conditions extant as late as 1965 and 1966. Suffice it to repeat what we said in the first *Wright* opinion:

> We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper. The subhuman conditions alleged [and substantially proved] by Wright to exist in the "strip cell" at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treat-

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[6] The rules and regulations of the New York State Department of Correctional Services have been changed since the decision below, in an attempt, according to appellants, to bring prison disciplinary hearing procedures at least to the minimum recognized in *Sostre*. *See* 7 N.Y.C. R.R. §§ 250-270. As with recent State efforts regarding cell conditions and treatment of inmates, *infra*, we commend the state for its responsiveness but say nothing, of course, as to the constitutionality of the new rules.

ment so foul, so inhuman and so violative of basic concepts of decency. *Trop* v. *Dulles*, 356 U.S. 86. . . .

387 F.2d at 526 (footnotes omitted). Similarly, we noted in *Sostre* that the conditions endured by Wright were "truly barbarous and inhumane," 442 F.2d at 194 & n. 27. Other courts have likewise found such conditions in violation of the Eighth Amendment, *e.g.*, *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Jones* v. *Wittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971); *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971); *Knuckles* v. *Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd* 435 F.2d 1255 (3rd Cir. 1970), *cert. denied* 403 U.S. 936 (1971); *Hancock* v. *Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969); *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Calif. 1966).

Our decision to reverse is a reflection of concern for the respective roles and responsibilities of federal courts and state officials, and not in any way an approval of the inhumane, degrading treatment occupants of segregation were forced to endure. Reversal is the more appropriate because New York has on its own motion acted to remedy perceived deficiencies in treatment of inmates in general as well as those confined to segregation or psychiatric observation cells. At oral argument, counsel for appellees, upon assurance by the state that the new rules of the Department of Correctional Services apply to psychiatric observation cells as well as to segregation cells, as much as conceded that the part of the district court's order dealing with this matter was no longer needed.

We say nothing as to the constitutionality of the new rules, but we note that the New York Correction Law was amended in 1970 to provide that each inmate is "entitled to clothing suited to the season and weather conditions and to a sufficient quantity of wholesome and nutritious

food," that no inmate shall be subjected to degrading treatment, that inmates confined to segregation cells "shall be supplied with a sufficient quantity of wholesome and nutritious food," and that "adequate sanitary and other conditions required for the health" of inmates in segregation shall be maintained. The facility superintendent is also required to make full reports regarding segregation inmates every five days to the commissioner. N.Y. Correction Law § 137, McKinney's Consol. Laws c. 43 (1971 Supp.)

The new rules of the Department of Correctional Services provide that no cell is ever to be maintained "as a place to subject an inmate to punitive confinement or confinement under degrading conditions," that no inmate "is ever to be confined in a place that is poorly lighted, poorly ventilated, inadequately heated, or likely to be injurious to his health," that every cell is to be equipped with lighting sufficient to read by, and with washstand, toilet, bed, and mattress (although they may be removed if there is imminent danger that such furnishings will be destroyed by the occupant or utilized to harm himself), that all inmates are entitled to personal hygiene supplies, cleansing equipment for the cell, writing materials, eyeglasses, and at least five books over and above legal materials. Provisions are also made for showers and exercise of segregation cell inmates, and regularized procedures established in the event an inmate is deprived of an otherwise required item or activity. The rules also provide that under no circumstances is an inmate to be deprived of an item or activity for the purpose of punishment or discipline. 7 N.Y.C.R.R. §§ 300.1-301.9.

This court in *Sostre* also weighed carefully the competing claims regarding censorship of communication, 442 F.2d at 199-201. The conclusion was that prison officials

may not delete material from, withhold, or refuse to mail a communication between an inmate and his attorney, or a court, or public official, unless the inmate or his correspondent abuses the access. Inmate allegations considered false, repetitious or malicious by the prison authorities do not amount to an abuse of access, which was defined in *Sostre* in terms of transmittal of contraband or the laying of plans for some unlawful scheme. Inasmuch as interference with inmate correspondence might be justifiable under such circumstances, we "necessarily rule[d] that prison officials may open and read all outgoing and incoming correspondence to and from" inmates, *id.* at 201. We therefore modify, to conform with *Sostre,* Judge Foley's order prohibiting censorship or interference "in any way with any correspondence" between Mosher and his attorney. Appellants may open and read correspondence between Mosher and his attorney, but they may not otherwise impede or interfere with it absent a clear abuse of access such as *Sostre* discusses.

We are advised by appellants that the recent policy of the Department of Correctional Services is to refrain even from opening and reading inmate-attorney mail. While this experimentation by the state indicates a willingness to go beyond what *Sostre* required, we are not persuaded that there is any need for the district court order to do likewise. What the federal courts must or should order and what the states are at liberty to essay are frequently poles apart. It is best that the state be left free to abandon its experiment and substitute other proper methods if it should conclude that it is advisable to do so.

Mosher's 616 days of "good time" were appropriately restored to him by the district court. He was first confined to segregation in 1967. After five months he was released to the general population, but two months later he

was returned upon repeat of the very violation for which he was punished with segregation in the first place. His second stay consumed a year, as he was confined "until further orders" and prolonged matters with various rule infractions while in segregation.[7]

Segregation conditions during Mosher's tenancy, while not ideal according to his testimony, especially in the cells comprising Section 4 (the "strip cells"), were nonetheless considerably improved since Wright's occupancy, and the district court's decision to restore lost "good time" rested on the finding that segregation was "grossly disproportionate for the offense committed" by Mosher. Judge Foley also found "that procedural safeguards in this instance might have averted or corrected this improper punishment," and that the disproportionate initial punishments were "clearly linked to the later violations in segregation." 321 F. Supp. at 145.

Ordinarily we would be most reluctant to find unconstitutionally disproportionate the use of segregated confinement as punishment. Prison officials, not federal judges, are in day to day proximity or contact with the inmates and are consequently better able to determine what punishment might or might not be appropriate to a particular offense committed by a particular inmate. An offense representing another in a series by one inmate might meet a harsher response than the same offense committed by an inmate with a "clean" prison record. Or a prison official might decide that a harsh punishment for a repeatedly disruptive inmate might, under the circumstances, simply reinforce a cycle of offense and punishment which the

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[7] While in segregation Mosher apparently yelled to other inmates (4 charges), was insolent or loud (5 charges), possessed contraband tobacco, gum, and fruit (a banana), threw four slices of bread out his window, and refused to stand at attention whenever a prison employee passed (8 charges). Exhibit E.

agacious employment of leniency might avoid. In short, he inmate alleging disproportionate punishment will ordiarily have a heavy burden.[8]

Here, however, we think that Mosher has successfully net this burden. His offense was his refusal to sign a prison "safety sheet", a single piece of paper with a list of precautions and instructions to be followed by inmates assigned to certain shops in the prison. The following circumstances in combination persuade us that Judge Foley was correct in finding segregation a disproportionate response to Mosher's refusal to sign the sheet:

First, Judge Foley found as a fact, and it is not suggested that this finding be disturbed on appeal, that Mosher believed in good faith that his signature would be the equivalent of a waiver by him of his right to sue the prison in the event he was injured while working in a prison shop due to the negligence of prison officials. This is important inasmuch as it bears on Mosher's attitude and the character of his defiance; that is, Mosher was apparently not making trouble for the sake of being a troublemaker.

Second, testimony by deposition of both Deputy Warden DeLong and Warden McMann indicates that the sole purpose of the safety sheet was simply to assure that inmates were familiar with shop safety regulations. Deputy Warden DeLong upon whose immediate direction Mosher was sent to segregation, testified that even if an inmate had read and understood the safety sheet he could not work until he signed, and a refusal to sign was tantamount to a refusal to work in his eyes. We have been pointed to no prison manual or rulebook authorizing such an interpreta-

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[8] *See also Knuckles* v. *Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd* 435 F.2d 1255 (3d Cir. 1970), *cert. denied* 403 U.S. 936 (1971); *Graham* v. *Willingham*, 384 F.2d 367 (1967).

tion of a refusal to sign or giving notice to an inmate that such a refusal was a violation or might result in segregation.

Third, and perhaps most important, is Warden McMann's testimony that segregation as punishment for refusal to sign the sheet was inappropriate. Indeed, he testified that no punishment whatsoever was warranted; assignment to "idle" population, where the inmate could not work and earn extra money, was the ordinary consequence of an "offense" such as Mosher's.

In short, for an act which even the warden found deserving of no punishment Mosher was disciplined with the worst punishment the prison had to offer, and it has nowhere been suggested that such a result came about through anything other than the unfettered discretion of the deputy warden. While the area of discretion of prison officials is exceedingly broad, it is not limitless. Appellants urge nothing more specific than that Deputy Warden DeLong's "personal experience" with Mosher somehow justified the use of "his discretion as a disciplinary officer in sending Mosher to segregation." Testimony from the record is no more illuminating: on the day Mosher was punished with segregation he had four previous offenses in prison;[9] that same day another inmate with six offenses refused to work[10] and was punished by DeLong with deprivation of yard privileges for 15 days. When DeLong was asked whether there was any reason for the difference in the punishment, he replied, "I do not recall anything about [the other inmate] nor do I recall anything in particular

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[9] These offenses, none of them involving physical violence or threat thereof, occurred over a period of three years, dating from Mosher's entry into the prison.

[10] Mosher did not refuse to work. He merely refused to sign the safety sheet.

about Mosher at that particular time. The only thing I can say is that due to the particular circumstances surrounding the case at that time, this was my decision.'"[11]

The word "discretion" is not talismanic. We think that when an inmate is punished as severely as possible for an act which the warden testifies deserves no sanctions whatsoever it behooves the punishing official to come forth with some justification other than that "the particular circumstances" warranted such discipline.[12]

Sostre is by no means to the contrary. This court there refused to find disproportionate punishment, noting its reluctance to "deny to prison authorities the power to use an entirely constitutional means of discipline in response . . . to a prisoner's refusal . . . to obey valid prison regulations." 442 F. 2d at 194. In a footnote to that passage, however, we said:

> We stress the seriousness of the multiple offenses charged against Sostre by Warden Follette . . . and express no view as to the constitutionality of such segregated confinement as Sostre experienced if it were imposed for lesser offenses. Specifically, we express no view as to the constitutionality of such segregated confinement if it had been imposed on account of any one or any combination of the offenses charged against Sostre other than all of them.

Id. n. 28.

Thus, although *Sostre* clearly holds that the federal courts should be chary in entertaining inmate petitions claiming unconstitutionally disproportionate punishment, it is equally clear that *Sostre* recognizes that such a consti-

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[11] Deposition of Perry J. DeLong, p. 117, Exhibit #2.

[12] *See also Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).

tutional violation might be made out under circumstances more compelling than those present therein.

We turn finally to the award by the District Court of $1500.00 damages in Wright's favor against appellant McMann. Reversal is urged on the ground that, although Judge Foley specifically rejected a defense of good faith or probable cause on the part of McMann, he made no finding that McMann personally imposed the deprivations that resulted in the unconstitutional treatment. To find McMann liable when lower prison officials were directly responsible for Wright's treatment, it is argued, is to assesss him under a theory of vicarious liability. We disagree.

In the first place, although Judge Foley made no specific findings to this effect, there is indeed evidence in the record from which it could readily be inferred that McMann had definite knowledge of the condition of the "strip cells." As both Judge Foley and this court in the first *Wright* opinion pointed out, McMann's Answer to Wright's complaint acknowledged pointblank that Wright's treatment was commonplace. The Answer states:

> It is the practice at Clinton Prison to place certain inmates in what is known as a strip cell at the time of their reception in segregation. . . . A strip cell has only the bare necessities and at times the clothing is taken from the prisoner and at night he is given a blanket to sleep upon the floor.

Also indicative of McMann's actual knowledge is the uncontradicted testimony of Wright that, upon his written complaint, F.B.I. officers interviewed him for several hours in a library behind McMann's office in 1965, and again upon a subsequent complaint from Wright in 1966. During the first interview, according to Wright, the federal officers

informed him that they had spoken with McMann as part of their investigation of his complaint.

Wright also testified without contradiction that while he was in segregation his complaints addressed to McMann resulted in his glasses and certain legal materials being restored to him. Furthermore, a letter sent to the commissioner of correction by Wright, in which he thoroughly detailed the conditions he was forced to endure in the "strip cell," passed through McMann's office en route and was read and initialed by him.[13]

Thus there is abundant evidence from which to conclude that McMann must have actually known of the strip cell conditions at the time in question.[14] Furthermore, he was charged with having such knowledge. Ultimate responsibility for the operation of the segregation cells was his, as is made clear from trial testimony, the Employees Rule Book of the New York State Department of Correction then in effect, and section 18, N.Y. Correction Law, McKinney's Consol. Laws c. 43 (1968), as amended L. 1970, c. 476, § 4 (1971 Supp.). Furthermore, section 114-a[15] of the New York Correction Law required that the warden

> shall cause to be kept a daily record of the proceedings of the prison, in which shall be entered a note . . . of every punishment inflicted on a prisoner, the nature and amount thereof and by whom it was inflicted, and also a memorandum of every well-founded complaint

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[13] Exhibit 43 and Tr. 1463.

[14] While we might remand to the district court for more specific findings in this matter, there is so much undisputed evidence in the record that this course is unnecessary.

[15] This section has been amended in light of nomenclature changes, e.g., correctional facilities for prisons, inmate for prisoner, employee for guard. The substance remains the same. N.Y. Correction Law § 114-a, McKinney's Consol. Laws c. 43 (1971 Supp.).

made by any prisoner of bad or insufficient food, want of clothing, or cruel or unjust treatment by a guard; ...

As against these directives that the warden exercise responsibility for and be familiar with the treatment of inmates, however, Judge Foley found that "there was a design to avoid written rule-making in the Clinton segregation unit" and that McMann made only "rare" visits to the segregation cells, 321 F. Supp. at 143.[16] In short, applying the common law tort standard appropriate in § 1983 cases, that one is liable for the "natural consequences of his actions," *Monroe* v. *Pape,* 365 U.S. 167, 187 (1967), we think appellant McMann knew or should have known that Wright was being forced to live under conditions described previously by this court as "foul" and "inhumane," 387 F.2d at 526, and today held unconstitutional.

We think Wright should be properly compensated for the suffering he had to endure, and recovery should not be defeated by an attempt by the warden to shift responsibility to inferiors when there is every reason to believe that he was aware of segregation cell conditions and when responsibility for permitting such conditions to exist was ultimately, in any event, squarely his. We are not moved by the suggestion that if we uphold liability today competent persons tomorrow will refuse to become superintendents,

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[16] Judge Foley relied for this finding in part upon the following testimony of appellant McMann:

Q. Now during your tenure as warden, during these four years, did you have occasion to visit the segregation units? A. I went there occasionally.

Q. Well, how often would you say that is? A. Well, very seldom, I don't pretend I went there very often, I couldn't tell you how often.

Q. Did you go there—don't you recall, can you make any estimate as to how often you went there? A. It wouldn't be any more often than six months, sometimes longer.

Tr. 1447.

as the title is presently designated. In the unlikely event that a prospective superintendent in fact turns down an offer for fear of personal liability, we think that the position is probably better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit.

OAKES, *Circuit Judge* (concurring):

I concur both in the result and in so much of Judge Lumbard's opinion that this opinion would be superfluous if I did not rather fundamentally disagree with the language of two parts of that opinion.

First, I believe it would be entirely appropriate—indeed mandated by the due process clause—for a federal court, absent state action, to require basic procedural safeguards in connection with prison disciplinary proceedings or to regulate conditions under which inmates are held in segregation or observation cells. *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3080 (U.S. Aug. 8, 1971) (No. 71-246) does not go so far as to hold otherwise although it rejected the orders made in that case. 442 F.2d at 194, 198. Since *Sostre* was decided, other courts have exercised under varying circumstances rather broad supervision of particular prison systems to assure —with rules by court order—that prisoners not be subjected to the "capricious and arbitrary actions of prison officials," as decried by *Sostre, supra* at 198. *Holt* v. *Sarver*, 442 F.2d 304 (8th Cir. 1971); *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971). The case is so old, however, and so much has transpired since it was initiated—including but not limited to the adoption of new rules by the New York Department of Correctional Services and amendment of the New York Correction Law, as set forth in Judge

Lumbard's opinion that it does not seem to me to be an appropriate vehicle for federal court promulgation of minimal correctional standards. Under appropriate circumstances, however, judicial intervention may be clearly warranted—nay, required—and this it seems to me Judge Lumbard's opinion does not make sufficiently clear. Thus, my own views as to federal judicial power accord closely with those of Judges Waterman, Smith and Feinberg, respectively concurring or concurring and dissenting in *Sostre, supra* at 206 and 207, although I do not believe this to be the appropriate case for its exercise.

I believe that Judge Lumbard's opinion correctly interprets *Sostre* in reference to censorship and communication by an inmate with his counsel, even though cases since *Sostre* have tended to take a view somewhat more protective of inmate rights. *E.g., Nolan* v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Smith* v. *Robbins*, 328 F. Supp. 162 (D. Me. 1971). In view of the new policy of the Department of Correctional Services to refrain from opening and reading inmate-attorney mail, however, this is plainly not the case in which this aspect of *Sostre*, 442 F.2d at 199-201, might bear re-examination. Given appropriate circumstances, however, I believe this court should not hesitate to accept the invitation of *Sostre* to expound "a more precise delineation of the boundaries of this protection . . . ," 442 F.2d 178, and if in doing so we necessarily draw them somewhat differently from *Sostre* itself, that is not impermissible. See Note, Prison Mail Censorship and the First Amendment, 81 Yale L.J. 87 (1972).

HAYS, *Circuit Judge*, dissenting in part:

I dissent from the affirmance of the district court's restoration of good time to Mosher, and the award of

damages to Wright against Warden McMann. In all other respects I concur with Judge Lumbard's opinion.

The restoration of good time to Mosher solely on the grounds of the disproportionate length of his term in segregation is an unwarranted extension of *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3431 (U.S. Feb. 28, 1972) (No. 71-246), and it violates good sense as well. Unlike Sostre, Mosher was not punished for engaging in constitutionally protected activity, nor did his punishment constitute such extreme physical abuse that the federal court was justified in intervening. *E.g.*, *Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S. Jan. 13, 1972) (No. 70-5025); *Inmates of the Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Sostre* v. *McGinnis*, *supra*. When one considers that we are powerless to reduce a prison sentence no matter how "disproportionate" the sentence may be to the offense, see, *e.g.*, *Jones* v. *United States*, —— F 2d —— (2d Cir. Dec. 28, 1971) (No. 71-1381) (Hays, *Circuit Judge*, concurring), there seems to be no adequate ground for our reviewing the loss of good time solely because the punishment appears excessive.

I also disagree with the majority's affirmance of the award of damages against McMann. The argument that McMann is "charged with" knowledge because of his statutory duties advances a theory of vicarious liability which is inappropriate in civil rights cases. See *Avins* v. *Mangum*, 450 F.2d 932 (2d Cir. 1971).

Appendix B.

[redacted] district court has had a steady contact with [redacted] prisoner problems for many years; mainly consisting [redacted] of federal habeas corpus applications. See [redacted] Walker v. LaVallee (NDNY) 224 F. Supp. [redacted]. In this District Court are located two such large [redacted] State prisons, Auburn Prison, Auburn, N. Y., [redacted] Prison, Dannemora, N. Y., wherein are confined prisoners convicted of the most serious crimes, many serving very long sentences. The increase in recent years in this District of filings by State prisoners has shifted emphasis from habeas corpus to civil rights claims under the United States Civil Rights Statutes. (US ex rel. Hancock v. Pate (1963) (ND Ill. ED) 223 F. Supp. 202; Jordan v. Fitzharris (ND Cal. SD) 257 F. Supp. 674 (1966); Hancock v. Avery (MD Tenn.) 300 F. Supp. 786 (1969).

The Wright case started in this District Court inasmuch as Wright was confined in Clinton Prison, Dannemora, N. Y., by the filing of a complaint March 11, 1966. Wright is serving a sentence of one day to life under [redacted] conviction of three counts charging sodomy, two counts charging assault and carnal abuse of a child. The late Judge Brennan of this Court dismissed the Wright complaint in a substantial opinion, reasoning there was not sufficient evidence to him from the complaint to warrant intrusion into the internal management of state prisons, particularly so without application first to and exhaustion of remedies in the State courts of New York. Judge Brennan expressed in his opinion full confidence the New York Courts would fashion conscientiously a remedy even if none were precisely present in the New York Statutes to entertain and correct the horrible wrongs, if true, claimed by plaintiff Wright during his confinement in the punitive segregation section at Clinton Prison for violations of prison rules and regulations. (Wright v. McMann (NDNY) 257 F. Supp. 739 (Aug. 31, 1966)).

Appendix B.

This ruling of dismissal by Judge Brennan was reversed by the Court of Appeals, Second Circuit, in an opinion that attracted nationwide attention in the news media. The appellate opinion is referred to often in text and judicial writings as an important one confirming the jurisdiction and obligation of federal courts to entertain and decide such claims. (Wright v. McMann, 2 Cir. 387 F. 2d 519 (Dec. 19, 1967)). Judge Kaufman in the majority opinion established the proposition that State prisoners have the right to seek federal relief ab initio if there is substance to the claimed deprivation and violation of constitutional rights under the Civil Rights Act during the prisoner's confinement. Judge Kaufman quoted verbatim a substantial portion from Wright's handwritten complaint describing in stirring and vivid prose disturbing conditions of his confinement in a so-called "strip cell" in the segregation unit of Clinton Prison. Giving the credit that must be accorded such allegations at the pleading stage, it was held there was enough substance to warrant reversal and remand for hearing of the issues. Judge Kaufman reviewed New York's remedies that might be applicable to this kind of claim and decided such were inadequate for full relief, and further decided a case of this kind was the least likely candidate for abstention. (Wright, supra, at pp. 524-525; Zwickler v. Koota, 389 US 241; McNeese v. Bd. of Education, 373 US 668, 673-74). Chief Judge Lumbard concurred a separate opinion "albeit reluctantly" with a statement appealing to me as a judge in a two-judge United States District Court in which substantial State prisoner business is never ending. (See Fay v. Noia, 372 US 391). Such free-wheeling filings by State prisoners are time consuming and uncontrollable as other litigation may be. Judge Lumbard stated unequivocally in Wright that he would hold if New York made provisions for injunctive relief as well as the legal relief seemingly

available that the federal courts should abstain for a reasonable period of time to allow the state courts to hear the complaint and take appropriate action. Judge Lumbard decried the fact that the majority court ruling, in which he reluctantly joined, would require a District Court to write some of the rules regarding State prison administration for the treatment of recalcitrant prisoners. He observed it was far better that the states should formulate, supervise and enforce their own rules regarding their State prisons. I agree wholeheartedly. Disciplinary proceedings and their use inside prison walls it should be obvious are matters of the utmost importance. I have found in more than twenty-one years of experience with prison grievances that in New York there is responsible attitude when attention is directed to unfairness that might exist for lack of appropriate and definite legal remedy to correct.

In regard to Clinton Prison inmates the acme of judicial service is furnished. By order of Judges, Appellate Division, Third Department, a regularly scheduled motion Session is held once a month for ten months of the year at the Prison by designated New York judges. The direction is to hear applications for writs of habeas corpus *or other proceedings* regarding detention or confinement. (See Court Ex. 1). By Chapter 658 of the Laws of 1969, New York, effective May 21, 1969, Section 79-c of the Civil Rights Law (McKinney's Consol. Laws of N. Y.), was amended to confer upon an imprisoned convict the right to injunctive relief for improper treatment where such treatment constitutes a violation of constitutional rights. The void and gap in New York remedies noted by Judge Lumbard was thereby filled by this New York legislation, and later New York Court ruling decided that the amendment was to be given liberal construction and retroactive application. (In re Marcelin v. Scott (App. Div., 3rd Dept.

Oct. 20, 1969) 33 AD 2d 588). However, the stages of the two cases herein have advanced too far along the federal route. The doctrine of abstention, unfortunately, I believe, seems more precarious today to apply than ever, even though common sense and good judgment indicate reliable and clear State remedies are now available that in the interests of federal-state comity should I think be accorded the first opportunity to rule upon claims of this kind charging cruel punishment and constitutional deprivations. (Holmes v. N.Y.C. Housing Authority, 2 Cir., 398 F. 2d, 262, 265-266; see also Houghton v. Shafer, 392 US 639). However, federal jurisdiction of these actions, based upon provisions of the Civil Rights Act, 42 USC 1981, 1983, 1985(c), in my judgment, can no longer be questioned under the precise appellate ruling of the Second Circuit in Wright. (See also U.S. ex rel. Rodriguez v. McGinnis (NDNY) 307 F. Supp. 627; Cooper v. Pate, 378 U.S. 546; Brown v. Brown, 9 Cir. 368 F. 2d 992; Wiltsie v. Calif., Dept. of Correction, 9 Cir., 406 F. 2d 515; Hill v. Schneckloth, 9 Cir., —— F. 2d, 3/11/70; pet. cert. filed 6/15/70, 38 U.S.L.W. 3525).

Plaintiff Mosher is serving a 40-60 year sentence that he commenced in 1964 on his plea of guilty to Robbery charges. I permitted the filing of his pro se complaint by memorandum-decision and order dated May 19, 1967. The claim involved similar assertions as those of Wright, in that he was being confined in the segregation unit at Clinton enduring cruel living conditions pursuant to administrative procedures and under reasons for such confinement that he claims were violative of constitutional rights. Paragraph 2 of the Mosher complaint alleges that punitive segregation for his refusal, that he admits, to sign a "safety sheeet", used in the institutional shops of the prison resulted in punishment out of proportion to the offense. Paragraph 4 refers to observation cell confine-

ments. This cell and its purposes shall be described herein later. Mosher claims the cell was used fraudulently by segregation guards without any formalities being followed and proper reason present when the segregation guards became displeased with segregation inmates conduct and wanted to make living conditions more unpleasant and unbearable than those said to exist in disciplinary segregation. A series of letters to me followed from Mosher after I permitted the filing of his complaint, and in accord with the liberal and informal treatment this Court gives pro se writings of State prisoners, some were filed formally as supplemental to the complaint and others were retained in the file in the Clerk's office for reference. The grievances in the letters run along the same lines as those in the complaint except there is description of new incidents that arose between Mosher and the guards in their daily close contact during the segregation regimen. These events resulted in continued segregation punishment for Mosher and prolongation of Mosher's confinement in segregation for a considerable period of time.

Attorney Betty D. Friedlander who acted as attorney for Wright on the appeal continued to act as his attorney for the trial and its preparation. I requested William Bennett Turner, an attorney with considerable experience in matters of this kind to represent Plaintiff Mosher and he willingly accepted such assignment and this Court is appreciative. By formal order dated August 28, 1968, the actions were directed to commence at joint trial on October 15, 1968, and such order noted that a satisfactory and productive pretrial conference had been held with the attorneys. Extensive and productive discovery and deposition procedures were permitted by me to be undertaken to the full extent permitted by the traditional liberality of the Federal Rules of Civil Procedure. Depositions of eight prison officials concerning their knowledge and experience

at Clinton Prison were taken. Wardens McMann and LaVallee, Deputy Warden DeLong, Prison Psychiatrist Dr. Freedman, Prison Physician Dr. Peda, several correction officers (guards) with duty assignments in segregatiton during the times in question, and one prisoner McIntyre were deposed. These depositions were offered in evidence at the trial and are marked as plaintiffs' exhibits. (Plaintiff exhibits are numbered; Defense exhibits are lettered, and references herein to the trial record shall be the prefix R).

A trial record of 1566 pages were compiled in a trial that covered seven trial days. At the end, I stated the trial had been an education to me although I had experience of twenty years with substantial numbers of State prisoner cases (R. 1553). The recanvass and review of the voluminous record that had to be done following delayed and substantial briefing fortifies this viewpoint. Time could be taken because Wright was transferred from Clinton segregation to another prison. Mosher was released from segregation to general population in December 1968 at Clinton Prison. The entire record of testimony and exhibits is a revealing and eye-opening one in regard to certain aspects of prison life in Clinton Prison. No matter the outcome finally in this litigation, there is a comprehensive record of the testimony of prisoners, obviously the difficult and troublesome ones to handle, during long periods, in their eyeball confrontation with the guards who have the difficult assignment to guard, feed and control them daily in a punitive segregation cell where they were kept around the clock with rare and short periods of release. One definite release from the segregation cell testified to was that the segregation inmates were taken down to the shower room along the gallery for their two-minute shower, as one prisoner estimated its time, every Sunday. The record is fascinating, full of humor and pathos despite the sadness of imprisonment, and as must be expected unfortunately

marred throughout with substantial inconsistencies and contradictions, not only by prisoners but correction personnel. The record, and I had no appetite to undertake its heavy burden no matter its interest, is a portrayal of the real thing; it is prison life as it is, not a stage play or TV or motion picture portrayal. In my judgment, it should be read with care by the executive, legal, legislative and correctional department heads of New York State Government who ultimately must bear the responsibility to insure New York State prisoners are treated humanely as I believe, being one, every citizen of New York wants and expects. The exploration here by trained and able lawyers opens up a facet of New York State prison discipline kept covered too long from the public view. I think it was assumed the public has little interest in the disciplining of the confined criminal element of society or the manner in which they are fed and clothed. However, it is clear that State prisons, or even local jails have become more and more, and rightly so, in this age proper subjects for scrutiny by representatives of the public and the courts when necessary. The higher echelon of Prison management are being held now to account and answer frequently about these matters. (See Judges and Wardens: Teammates for Rehabilitation, by U. S. District Judge George H. Boldt, Judicature, The Journal of the American Judicature Society, January, 1970, Vol. 53; State of Prisons in the United States: 1870-1970; Negley K. Teeters, Ph.D., Federal Probation: A Journal of Correctional Philosophy and Practice, Vol. XXXIII, December 1969). No longer can prisons and their inmates be considered a closed society with every internal disciplinary judgment to be blissfully regarded as immune from the limelight that all public agencies ordinarily are subject to. It does seem that the fate and nature of confinement for persons convicted of crime is of little concern to society in general. Many

have been smug by rationalizing that if unpleasant problems arise in the prisons, the prisoners brought it on themselves and the less public notice the better.

Security, of course, has been and should be a paramount objective in maximum security prisons. It is a primary consideration I keep in mind throughout the decision I make in these actions. That factor unquestionably must be considered carefully when weighing the propriety and reasonableness of judgments made in these tensest of surroundings to uphold discipline and moral. Such decisions have to be quickly made and their role in my opinion is extremely important to guard against as much as humanly possible, insurrection, riot and terrorizing jailbreak. (See US ex rel. Wade v. Jackson (NDNY 1956) 144 F. Supp. 458; reversed 2 Cir., 256 F. 2d 7). The Wade case involved the sensational New York Sing Sing jailbreak in 1941 in which an unarmed guard was killed inside the prison, and a police officer on a public street in Ossining, N. Y. Judge Youngdahl described the gravity of the relationship so well: "The association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." (Edwards v. Sard (DCDC) 250 F. Supp. 977, 981). However, there are risks in every phase of human life and this State interest can never justify treatment and procedures in prison confinement proven violative of human decency and constitutional rights. The judicial complacency of the past in regard to these problems and cautions for courts to refrain whenever possible as I noted in Rodriguez v. McGinnis (NDNY) 307 F. Supp. 627, has been discarded. The Circuit Court statements in review of this Wright v. McMann action are further proof of the new attitude in these matters. The New York Court of Appeals, responsive and progressive, has been no different in its consideration of State prisoner

problems. Several years ago that Court commented in Brown v. Johnston, 9 NY 2d 482, at 485, that an individual once validly convicted and placed under Department of Correction jurisdiction is not to be divested of all rights and unilaterally abandoned and forgotten by the remainder of society. (See also Brabson v. Wilkins, 19 NY 2d 433).

Chief Justice Burger, a leader in the stimulation of new interest in prison reforms, has stated that prisoners after conviction cannot be considered as human rubbish and that a visit to most prisons will make one a zealot for reform. The diligent defense lawyers in these actions have supplied new decisions passing upon civil rights actions of prisoners confined in State Prisons other than New York. (Holt et al. v. Sarver (ED Ark.) 309 F. Supp. 362, 2/18/70, 38 US Law Week 2462; Hancock v. Avery (MD Tenn.) 301 F. Supp. 786; see also Jordan v. Fitzharris (ND Cal.) 257 F. Supp. 674; Burns v. Swenson (WD Mo. 288 F. Supp. 4). A unique approach by a Federal District Court to this type problem involving a group of State prisoners confined in Rhode Island is demonstrated recently by the decision in Morris v. Travisono (D.C.R.I.) 310 F. Supp. 857 (1970). The methods of consultation and conciliation were invoked. There was complaint of alleged application of arbitrary and discriminatory rules and procedures in the confinement to punitive segregation for discipline. In a remarkable innovation, the District Judge not only had opposing counsel produce a tentative set of new rules but heard views and considered responses regarding their draft and content from the plaintiff prisoners also. Jurisdiction over the case for 18 months was retained to oversee admi- -ation of the new regulations for possible revision after practical application in the Prison. This is a long term supervision for a federal Court but I suppose the hope of final voluntary settlement of prickly issues may make such a program worth the attempt. The outcome should be of

great interest to all correction, legal and judicial officers, both State and Federal.

This preface of review, philosophical and otherwise, is set forth in an attempt to interest these executive, legislative, and legal heads of New York in the proposition that possibly the Rules and Regulations promulgated for New York prisons, particularly those relating to segregation confinement and its living conditions and administrative procedures for hearing and disposition of charges that lead to this type confinement or other serious punishment, be reviewed and updated to conform at least in principle if not exact wording to those similar type rules and regulations recommended by responsible sources and recognized as progressive and in step with modern concepts. (See Manual of Correctional Standards (Pl. Ex. 30); Missouri State Penitentiary Rules & Procedures (Pl. Ex. 29); Task Force Report on Corrections, issued May 1967 by President's Commission on Law Enforcement & Administration of Justice, excerpt thereof referred to in Wright v. McMann, supra pg. 527).

There is no intention on my part to be critical of the Department of Correction of New York, its personnel or the Wardens and Deputy Wardens of the large maximum security prison involved in this litigation. This record demonstrates clearly that the Wardens and Deputy Wardens advanced through the ranks during many years of experience in a variety of correctional positions with the active and daily problems of prison life. There is no question in my mind of their personal and official dedication to safeguarding the public interest or to their integrity. My relationship with New York State Correctional personnel in a great number of cases involving State Prisoners has always been afforded an attitude of cooperation from them in the processing of prisoner applications and the production of prisoners when necessary at times and places where

this Federal Court sits, usually several hundred miles from the Prisons. (See U. S. ex rel. Bruno v. Herold, 2 Cir. 408 F. 2d 125, fn. p. 130). That cooperation has never been better demonstrated than during the trial of these actions when nine prisoner witnesses and the two plaintiffs had to be transported and kept in the Albany area to be available at the appropriate time during a lengthy trial.

Over the years at a number of hearings when State prisoners were before me on the witness stand, I always made it a point to inquire how they were being treated. Ironically, and this is true mostly of the Clinton prisoners, the answer was they were being treated all right. Several whom I recall gave specific examples. I recall one showing his new false teeth with pride, others telling about obtaining the equivalent of a high school diploma, or teaching and learning languages and art. These are small things, of course, but they struck me as signs of humaneness. The prisoners were always dressed in well fitting civilian clothing and none of them gave any appearance that would lead to the slightest suspicion of physical mistreatment or undernourishment. Wright and Mosher had similar appearance during the trial of these cases. Testimony in this record from all the prisoners unequivocally support the conclusion there are no serious grievances they have as inmates in the so-called general population at Clinton Prison (R 534, 1026, 1034). It should be noted that plaintiffs, Wright and Mosher, in fact by their pleadings and testimony, aim their charges of alleged civil right wrongs mainly against Section 4, a unit of twelve cells, located in a 48 cell disciplinary segregation building, called the "Box" by inmates. There is also criticism against several so-called "dark cells" in the segregation building, and the observation cells located in a separate building (See Photographs-Def. Exs. A thru K). Wright testified that in 1967, conditions in segregation at Clinton

Prison vastly improved. (R 77-87, 170-175). To support a finding that general population living conditions are all right although not in this record, judicial notice is stretched to refer to a book in the vein of a Baedeker travel guide for United States Prisons. It is My American Prisons, by Parisian Jacques Angelvin, and was given capsule review in Time Magazine, December 6, 1968 Issue, p. 33. Dannemora (Clinton) as he appraised it from his actual confinement is thus described:

"Dannemora: Scenically located on the Canadian border; cells resemble those at Sing Sing and are impeccably clean; siesta permitted between morning and afternoon work periods; ice skating, bobsledding and skiing available in season; clientele permitted to have their own gardens (Angelvin was allowed to raise his own potatoes so as not to have to eat frozen french fries); waiters in the dining room attired in white hats, jackets and gloves."

This description may seem in the nature of a spoof, farfetched and tongue in cheek. Mosher, however, at the trial of these actions told about groups of prisoners allotted little plots of ground in the Prison yard at Clinton with facilities to store food and cooking utensils, with oil drum stoves provided for outdoor cooking. Mosher testified that at one time when in good graces he was selected as foreman or court manager of one group of 12 or 13 that had space in the North Yard for these unusual privileges of being able to boil a pot of coffee and prepare outdoors their own meal to their own liking (R 1009-1012). It was a food episode that led to the compounding of Mosher's problems when confined in segregation. In segregation the prisoners are fed in their cells by two guards coming down the gallery or walking alongside the cells, pushing a warm food wagon. The food as selected by each prisoner in their individual cells is put in one or two bowls by the guards who measure out the portions as the bowls

are passed into the prisoner to eat from with a spoon. The humor mixture in the sadness of any prison confinement was the testimony of Mosher that one of the serving guards had the habit of "rubbing his nose and picking his ears" before handing the food through the bars. Mosher asked him if it was possible for him to use a napkin or pick up the food in a spoon. Mosher said the guard remarked, "What do you think, you are in the Waldorf-Astoria" and Mosher's reply was "No, far from it" (R 1032). Also, Mosher was complacent about the usual direction given when taken to the segregation unit to take off the prison clothes he wore regularly and was given the segregation unit clothing. When asked if the segregation clothes fit by his attorney at this trial, he answered, "They could have been better, you know, but I wasn't going anywhere, you know" (R 1020).

The submission of these actions is in the massive category. Together with extensive briefing, there are filed for Wright by number 250 Proposed Findings of Fact and eleven Proposed Conclusions of Law. Proposed Findings of Fact for Mosher number 254, with eight proposed Conclusions of Law. It has always been my custom and practice to make my findings in my own language and in my own manner, endeavoring to state the fundamental findings that I believe are involved by the issues presented. These detailed findings for the plaintiffs, accurately keyed to the record and exhibits, however, shall be filed with this decision as possibly being helpful, as I have found them, for convenient reference and as an aid to those who may be next to review and consider this substantial record.

Undoubtedly, the plaintiffs' attorneys, to whom the highest credit must be given for motives solely to promote expertly through the channels of the law humanitarianism in prison confinement, seek to use by unmatchable zeal these Wright-Mosher actions as a vehicle for reform of practically every deficiency and flaw that might exist in the

Appendix III

[illegible] conditions [illegible] to it. [illegible] permit [illegible] presentation of [illegible] of the [illegible] expressed [illegible] of the de- [illegible] centuries [illegible] since the [illegible] relevancy permit in federal courts [illegible] presentation of evidence than in other [illegible] however [illegible] rulings were based [illegible] numerous complaints filed in [illegible] action under the Civil [illegible] overwhelming of pa- [illegible] action. It seemed better for all concerned [illegible] light of the testimony under [illegible] incident physical assaults [illegible] minimum in notice of [illegible] hearing and review of rules and regulation [illegible] that result in segregation confinement at Clin- [illegible] there is any element of truth in such [illegible] investigated and steps taken to [illegible] appropriate revision of the [illegible] supervision and enforcement to in- [illegible] with their wording. However, the search [illegible] of this record upon my part must re- [illegible] within the issues raised by the pleadings [illegible] follow, at least in the Wright case, the guides [illegible] contained in the appellate writing that remanded the Wright case for further proceedings in this District Court not inconsistent with the appellate opinion. (Wright, supra, p. 327.)

In fairness to New York, it must be noted that changes and improvements have taken place in the living conditions in the 4 Section of the Segregation Unit, the place most complained about, since the initiation of the Wright action and the strong writing in the remand of it that as expected

stimulated much other litigation from other prisoners who are or have been confined therein.

As stated before, plaintiff Wright testified that in 1967 conditions in segregation had vastly improved since 1966 (R 170-175). Keeping prisoners nude was discontinued by verbal directive (R 1258). Warden McMann directed that all inmates in segregation be given at least a suit of long underwear and socks (R 1448-9). Normally, inmates in segregation and observation cells are now given bed, sheets, pillow-and bankets; shirt, pants and pair of socks (R 1447-9, see also Ex. 22: par. 33). Plaintiff Mosher testified that two and one-half months before the hearing in these actions before me he was given broom, scrubbing brushes, and hot water whereby he could thoroughly clean his segregation cell as he wanted it (R 1041). Section 4 prisoners since June 1968 are now allowed to use the small, enclosed patio behind each cell for exercise one hour a day (R 546, 1025, 1475; Ex. 6: p. 9). Two "dark cells" that are in the segregation building have had their solid steel doors removed, and although there is confusion in the record as to the number of times previously used, there seems to be agreement the Wardens did not know of their use in particular instances and they apparently agree they should rarely be used (Ex. 1: pp. 26, 28; R 519, 1040, 1520; Ex. 2, p. 55). Confinement in these two so-called "dark cells" was unquestionably a cruel one, and it was testified to by Warden LaVallee that their use has been discontinued (R 1499-1500). Revised Rules covering disciplinary matters and procedures were issued by Commissioner of Correction McGinnis, effective March 1, 1969 (Court Ex. 2). It is extremely important to note that the New York Legislature amended the Correction Law in many respects. Most important to the issues here are the repeal of Sections 137, 138, 139 and 140 of such law by addition of a new Section 137, particularly in subdivisions (5) and (6) that direct proper treatment of any inmates and proper

living conditions for those kept in segregation (Ch. 476, Section 137, McKinney's Session Laws of N. Y., effective July 8, 1970). It is argued that these belated improvements and changes should not warrant escape from responsibility in this litigation but, to my mind, such should be welcomed at least as signs of recognition in New York that there must be change from past practices. As Justice Frankfurter observed in his dissent in Henslee v. Union Planters Bank (1948) 335 U. S. 595 at p. 600, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

President Bernard G. Segal of the American Bar Association observed in his recent article on the President's Page, June 1970—Issue—American Bar Assoc. Journal, "The deficiencies in present correctional facilities and programs have been adequately identified by a considerable amount of inquiry and research, and specific reform proposals for modern and enlightened programs—standards, facilities, services—have been developed by authoritative government and private sources. What is needed now is a nationwide campaign to translate these recommendations into action".

No one ever had and probably never will have all the answers for these disciplinary problems. An eminent witness in this trial, James V. Bennett, testified the maintenance of discipline in prisons is a very difficult, perplexing problem (R 297). An extensive opinion with studied research was handed down by United States District Judge Motley that touches on practically every facet of New York prison disciplinary procedures and punishment in Sostre v. Rockefeller, McGinnis, Mancusi and Follette (SDNY) —— F. Supp. ——, 68 Civ. 4058, May 14, 1970, 38 U. S. Law Week 2619. Governor Rockefeller was named only in one claim and that claim was dismissed against all defendants. In the other claims, substantial

money damages were assessed against the other defendants, Correction Commissioner and Wardens, and jurisdiction was retained to allow them an opportunity to submit for approval to the Judge proposed rules regarding New York prison practices and disciplinary procedures required by the opinion. One of the issues of great importance, but not present here, was the right of prisoners to freedom of political expression when confined. There is scholarly and thorough research of the problems of jurisdiction, immunity of the State officers and the compensatory and punitive damage award, that may forge the way for authoritative and definite rulings by higher judicial authority. The District Courts in my opinion are in dire need of further guidance in these areas. The hearing requirements and procedures outlined by Judge Motley to be promulgated and followed to accord with due process are bound, I believe, to create serious divergence of viewpoint. However, the dialogue, administrative and judicial, that will now occur will be beneficial to obtain the sensible and workable improvements in these prison situations earnestly desired by many. (See Nolan v. Scafati (DC Mass.-1969), 306 F. Supp. 1; Roberts v. Pepersack (DC Maryland-1966), 256 F. Supp. 415.

First, it is urged that the present actions may be treated as class actions pursuant to Federal Rule of Civil Procedure 23 provisions, as applied in Jackson v. Bishop, 8 Cir., Blackmun, H. A., 404 F. 2d 571. The Jackson case involved the use of a leather strap to flog the prisoner on his bare buttocks as an approved disciplinary measure in the Arkansas penal institutions. New York has definite prohibition against physical punishment or abuse of any prisoners. Sound writing indicates such conversion to class action ordinarily is not appropriate nor so intended to apply in mass tort cases where damages, liability and defenses affect individuals in different ways. (Class Ac-

tions-Wright-47 F.R.D. 169-185, at p. 179; see also Washington v. Lee (MD Ala.) 263 F. Supp. 327, 330-31, aff'd. per cur. 390 U. S. 333; Green v. Wolf Corp., et al., 2 Cir. 406 F. 2d 291; the City of New York v. International Pipe etc., 2 Cir., 410 F. 2d 295). These actions shall be treated only as individual ones, tried together by consent. Plaintiff Wright seeks money damages in the amount of $10,000.00 and injunctive relief for the alleged violations of his constitutional rights. Plaintiff Mosher seeks only injunctive relief and has waived expressly any claim for award of money damages. The issues in each action shall be discussed and decided separately. There is important testimony and exhibits common and pertinent to both, but essentially, in my judgment the number of issues necessary to decide are relatively few, with focus of the search narrow inasmuch as it must remain reasonably within the limits and purposes of the appellate remand decision by the Circuit Court of Appeals in Wright.

I

Wright

The pattern for the Wright findings to be made is laid out in the appellate writing:

> "We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper. The subhuman conditions alleged by Wright to exist in the 'strip cell' at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment

so foul, so inhuman and so violative of basic concepts of decency. Trop v. Dulles, 356 U. S. 86, 100, 101." (Wright v. McMann, 2 Cir., 387 F. 2d 519, at 526).

Of course, this general statement must be related to the particulars developed for Wright at the trial in order to perform properly my function as the fact-finder regarding the essential elements necessary to be proven to support his claim of deprivation and violation of federal constitutional rights and privileges. It should be emphasized from the record there is nothing to support a contention that segregation for a period of time and under proper conditions in a State prison to enforce discipline is unconstitutional per se. Witness Bennett, with long experience as nationwide director of federal prisons, testifying for the plaintiffs said it was perfectly proper for a time, that we cannot abolish segregation cell blocks, and that we have to have them even in this new day of prison reforms (R. 255, 293). Dr. Joseph Satten, a physician specializing in psychiatry, eminent also in this field of study of prison confinement and its consequences, and Chief of the division of law and psychiatry at the Menninger Hospital and Foundation, training qualified psychiatrists for correctional service, gave for this record an illuminating discussion concerning confinement problems in major prisons and its effect upon the human inmates (R. 412-478). He did not rule out either the need for punitive segregation confinement although he emphasized the care to be taken concerning its conditions and the length of its use due to the serious impact it may have upon certain prisoners due to their individual mental and physical attitudes and capacities (R. 471-473). It is interesting to note that this doctor who has devoted his life to the study of prison confinement with extensive practical contact with and observation of many prisons

does not feel an inmate should be entitled to counsel when charged with violation of prison rules and regulations (R. 474).

I find with little difficulty from this record that in 1965 and in 1966 when Wright was confined to punitive segregation, such confinement in view of certain living conditions that existed then in the so-called "strip cell" and in a state of complete nudity was cruel and unusual infliction of punishment as that clause of the Eighth Amendment to the United States Constitution should be interpreted and applied. There is no preciseness to define and apply this constitutional prohibition but sensible guide for assistance comes from an opinion of the highest judicial authority in the land that: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U. S. 86, 99-101; see also Weems, 217 U. S. 349.

Together with the evidence in the record in my judgment to support this finding of cruel and unusual punishment inflicted upon Wright in 1965 and 1966 in certain periods of his segregation confinement, there is the unusual feature that the defendant Wardens' Answer in the Wright action filed in this Court April 26, 1966, admits several elements that on their face give serious concern about the segregation cell conditions under which Wright was confined, and would be ones ordinarily involved in dispute. The first affirmative defense describes Wright as a "glib psychopath" (he has been confined to mental institutions on several occasions); alleges that it was the practice during those years to place certain inmates in what was known as a strip cell at the time of their reception in segregation; that (and this clause is verbatim) a strip cell has only the bare necessities and at times the clothing is taken from the prisoner and at night he is given a blanket to sleep

upon the floor; that the practice to keep a prisoner, first in a strip cell, as admittedly Wright was kept for at least some time, was routine treatment in the interests of prisoner discipline and to minimize the dangerous propensities certain prisoners might have in regard to their person and the ordinary prison furnishings in a cell.

From this Answer itself, and it is noted in the Wright Appellate opinion in fn. 15, the justification sought to be established by the pleading that certain prisoners must be kept in a strip cell because they may become violent, tear the cell up, and so forth is destroyed by the admission that it was routine for inmates when first received in segregation to put them in a strip cell. Unquestionably, the stripping of the cell and the nudity of Wright was for discipline, alone, and no facts are shown to support possible conduct on his part that would imperil himself or the cell. Wright was placed in such barren confinement nude, and I so find, when first received on February 18, 1965 and February 9, 1966. Therefore, I find it was done purely for disciplinary purposes and not from any tendencies exhibited that gave reasonable grounds for fear of suicide or destruction of prison property.

According to a single page, sparse interdepartmental communication dated April 24, 1954, inmates placed in segregation for disciplinary reasons other than for refusal to work were to be placed in 4 Section upon arrival in segregation for 30 days. (Ex. 19). Further, Rules for the operation of segregation were issued by Deputy Warden DeLong, August 9, 1967, as a reissue of the 1954 Rules. (Ex. 22). A most important rule therein is No. 33: "Inmates in a strip cell and observation cell will be issued one each pad, blanket, shirt, pants and a pair of shoes. (No shoe strings or belt will be issued)." This instruction came after the Wright confinements.

In 1965 and 1966, the confinement that Wright complains of was harsh and rugged in the 4 Section. Deputy Warden

DeLong described the activity of the day in this Section. (Ex. 2: p. 133). Strip, at least during the times in question, meant literally the everyday sense of that word. The light bulbs were removed in the 4 Section, and the only fixtures an inmate had in the cell during a long day were a toilet and washbowl. Deputy Warden DeLong in his deposition, explaining these features, said the inmate in 4 Section did not have a stool or anything to sit on; it seems to have been the practice not to furnish a bedstead, and in any event the bedding was removed during the day from 7:30 A.M. to 10:00 P.M. (Ex. 2: pp. 37-47). There was no radio or smoking privileges, and the reading material was very limited. The inmates of 4 Section were on their feet all day from 7:30 A.M. to 10:00 P.M. with no place to sit except on the floor or toilet bowl. As noted previously, they had to eat from a bowl with a spoon and had to fashion their own way to handle the bowl to eat. (R. 1028). Another requirement only for 4 Section was that the inmates stand at attention at the door of their cell in the 4 Section every time correction personnel of every type would pass the cell upon the gallery. This was no written rule, but such practice was enforced. (Ex. 2: pp. 108, 110, 133-34; R. 69, 532, 597, 1021, 1066, 1234). Deputy Warden DeLong said standing at attention would help them sleep at night. (R. 1233). Wright was kept for a number of days in 3 Section completely nude, and the segregation cell in which he was confined was stripped of all furnishings, leaving only the toilet and sink. (R. 158-61, 70, 368, 571, 1193, 1220-1, 1535; Ex. 6: p. 12; Ex. 9: p. 8; Ex. 39: pp. 168, 248; Ex. 41: p. 22). Section 3 was used for strip cell confinement when so ordered in the same manner as 4 Section strip cell. I find that nudity was definitely used as part of the disciplinary punishment with the thought to demean, if nudity so does. I also find that part of the strip cell treatment was to keep the cell in not too

clean a condition. The strip cell inmate was only furnished a rag and insufficient scouring powder to clean it with. No program to clean it between inhabitants existed. (Ex. 2: pp. 69, 174, 653, 1022, 1236). Warden McMann changed certain customs of nudity and cell conditions, after he found out about Wright. (R. 1192-3, 1220, 1256-8, 1448-9, 1457). Eyeglasses were taken from strip cell inmates, and were taken from Wright for a period of days; this practice being changed in 1967, (R. 88-9; Ex. 5: p. 31). I find that Wright was deprived of hygienic implements inside the strip cell, i.e. those common to every day life, such as soap, towel and toilet paper, and that these things would be kept on the window sills outside the strip cells, only to be handed in by the correction officers upon request according to the testimony of Warden McMann. (R. 1459). Under this arrangement, it is not difficult to believe, and I so find that at times these requests would be ignored either deliberately or by reason of the guards being unavailable at the propitious time, and I find as testified to by Wright and several inmates that on occasion they had to use their hand to finish their toilet use. (R. 327, 481, 545, 571). In the observation cell where Wright was confined in April 1965, there was no toilet or sink in the cell, and the procedure to go to the bathroom was more complicated in that when the call of nature came the inmate had to at times wait for the one guard engaged in making his rounds to call in another guard to accompany Wright to the toilet facility. (R. 191-2; 647).

Of course, the temperature maintained in 4 Segregation Unit during the winter months is very important when the finding is made that Wright was kept completely nude in 1965 for 11 days and had to sleep on the cement floor without bed or mattress, and was kept nude under the same conditions for 21 days commencing in February 1966. (R. 61, 70-71, 77, 79, 231; 130, 149, 1145-6, 1192, 1306-07, 1348, 1390; Ex. 43).

Appendix B.

Deputy Warden DeLong admits Wright was nude for 8 days in 1966 (R. 1248). Correction officer Kennedy, often in charge in 4 Segregation, said Wright was nude in 1965 (Ex. 6: 22). Wright said for first two days in 1965 there was no heat in the radiator in his cell (each segregation cell has its own radiator); that in the late afternoon shift the windows were open and making it very cold, although his estimate was that the temperature in his cell was 35°-40°, and not a sub-zero temperature (R. 225-232, 527-528, 575). I am quick to say there is no intent on my part to imply that sleeping on a concrete floor with no blanket or mattress, may not in itself be inhumane unless good reason from violent conduct of an inmate justifies such type of treatment—unquestionably harsh. The eminence of Director Bennett was recognized in Jackson v. Bishop (DCED), Arkansas 268 F. Supp. 804, 813, and from his long experience he testified that at times an inmate might become a suicidal risk, uncontrollable and violent, that taking the clothing away might be necessary, although in the federal prison system an inmate may be deprived of clothing only when so prescribed by a medical officer (R. 260). Director Bennett gave sensible reasons why the standing at attention at the door cells might be needed for short periods of time to check the segregation inmates if not done for pure harassment (R. 268). He said that an inmate can properly be deprived of his bed and sheets if he uses them improperly or he is continuously abusive, but he should never be required to sleep on a bare floor (R. 266-267).

In paragraph 12 of his complaint, filed on March 11, 1966, Wright claims he was "without clothing and entirely nude for several days" during his 1965 segregation confinement, after which he was given what he describes as a thin pair of underwear. In regard to the 1966 confinement, he seems to claim nudity during most of the time he

was left in the 4 Section, asserting the sub-freezing temperatures caused by the deliberate opening of windows by the guards during both confinements. The Almighty could not penetrate the contradictions in this record in that regard and the testimony concerning heat is practically in the same impenetrable category. Seven guards testified the temperature was always comfortable, and much of their testimony was that it was so comfortable they worked in their shirtsleeves during the hours when temperature is in serious dispute (R. 1140, 1196, 1275, 1318, 1386, 1433).

However, there was an unexplained lack of a thermometer in the regregation unit to support the guards' feeling of comfort, and most important to me I find support for Wright's and other inmates testimony that the cells were kept cold at times for discipline by the lack of any entry in the log books about the prevailing temperatures during certain portions of the day. This seems to me an effective way to insure proper temperature by imposing as a routine obligation upon the guards to log the heat temperature at certain times of the day and night in the log book. I accept, at least in regard to Wright, particularly when combined with his nudity and lack of pad or mattress, that the temperature was cold to an inhumane degree, and caused extreme discomfort (R. 70, 227-8, 527-8, 576, 654-5; Ex. 9: 8; Ex. 39: 66). So I find Wright was kept nude for 11 days without bed or mattress under cold conditions for several nights of those days although a radiator in the cell was turned on after two days, and he was kept nude in 1966 in 4 Segregation Section under similar conditions for certain portions of 21 days (R. 225, 230, 128-9, 130, 149).

There are a number of matters about which proof was taken and concerning which the dedicated attorneys for the plaintiffs want considered as issues under the framework of the pleadings in both these actions but I am not so inclined. Many of these issues are peripheral to and not

directly involved I believe reasonably under the Wright-Mosher challenges. Proposed Findings of Fact, Conclusions and detailed decree has been submitted in their regard. Generally, I do consider it unwise that in these days of prison reform on its own the State does not make certain changes, but such thinking on my part does not create federal constitutional issue. The question of legal assistance by one prisoner to another has been finally settled by the United States Supreme Court in Johnson v. Avery, 393 U. S. 483. Such assistance can no longer be prohibited, but can be reasonably regulated by the prison officials. In regard to such problems at Clinton Prison, United States District Judge Palmieri of the Southern District of New York has ruled that it is clear that legal assistance of prisoners by other prisoners in preparation of legal papers, as well as access to law books, are not prohibited, but simply subject to reasonable regulation and control by the Warden. Such ruling I accept as controlling here. (U. S. ex rel. Scott v. LaVallee (SDNY), 69 Civ. 2627, 10/28/69.) The deprivation of Wright of his Bible he claims he wanted while in his segregation cell for several days, and the custom not to allow him or other segregation inmates to attend corporate religious services, I do not find ascend to the proportion of federal constitutional violation under this record. (See Cooper v. Pate, 378 U. S. 546.) It does seem to me that if any inmates at any time should be allowed reasonable access to religious texts, ceremonies, and counsel, if they are sincere, they surely should be those confined in the segregation unit for incorrigibility and infraction of Prison rules. Wright testified he had a Catholic Chaplain visit him in segregation in 1965 and received ashes from that Chaplain in 1966 (R. 407-408). I do find that a doctor with an inmate orderly visited and made the rounds of every segregation cell daily. The plaintiffs' attorneys contend there should

also be at least periodic visits by one of the prison psychiatrists, and also that the guidance and counseling services available rendered by program to the general population should be provided for segregation prisoners. I agree again that if there is any place the need for these services should be apparent is in the Segregation Unit and I would think New York would voluntarily begin to so act in accord with modern prison practices and standards. The power placed in one man, the Deputy Warden, to decide the disciplinary charges and punishment, is an awesome one but I am not going to go so far as to dictate by judicial fiat that a three-man disciplinary committee is constitutionally necessary to so determine. The eminent experts in the trial of these actions did not so contend as an absolute, except to say as is true that three minds may be better than one (R. 473-4). However, in this regard, appropriate and plain rules unquestionably should be promulgated to safeguard that the one man decision-maker, the Deputy Warden, or the three-man disciplinary Board, if such is created, have procedural written rules with sensible guidelines not only for the hearing role, practically judicial, but also with proper and timely avenues provided for review and formal appeal from disciplinary decisions that it is clear from this record have the most serious consequences upon a prisoner's imprisonment and release date. In this respect, it seems to me that the directive of Judge Motley for rules and regulations to be submitted on that aspect is sufficient to accomplish the relief sought here. At the time Judge Motley set for the submission of new rules and procedures, or whenever so submitted to her, I hereby accept as the appropriate time such submission be made to me of new rules for disciplinary hearings and review. Jurisdiction is retained for this compliance. There should also be more detailed rules written for confinement in observation cell,

a direct issue here, that shall only be used for psychiatric observation unless extreme circumstances dictate otherwise. I believe it is wrong for the Deputy Warden to have the power to hand down UFO sentences, which mean until further orders. Such allow the Sword of Damocles to hang for considerable periods of time and unquestionably must cause mental aggravation and unrest in a prisoner's mind solely because of indefiniteness. For this record, Correction Officer Kennedy testified he knew of inmates confined in segregation for two years (R. 1328). Deputy Warden DeLong, who apparently has imposed peremptorily a great number of segregation confinement sentences, mostly indefinite, testified in his deposition, quite boastfully as I read it, that if the prisoner in segregation did not come around to the unwritten criteria he wanted, such criteria being subjective and derived from custom, he had the discretion under certain circumstances to keep a prisoner in segregation during his whole term (Ex. 2: 165). This power, considering that disciplinary officers as Judges, are not divinely inspired to be infallible, must be curtailed by reasonable written regulation of higher authority. This looseness in the imposition of serious discipline punishment is particularly questionable when weighed with the fact there are no official written channels for authoritative and formal review and appeal. Such safeguards are deemed essential and recommended by responsible sources. (A Manual of Correctional Standards, Ex. 30: p. 410; Edwards v. Duncan, 4 Cir., 355 F. 2d 993, 994-5.) There is promise of some improvement by the Revised Procedure covering Disciplinary Matters issued February 21, 1969, by Commissioner McGinnis (Court Ex. 2), but I do direct that another look be taken and further improvements be added to conform to a greater extent with procedures recommended by competent sources and adopted in other States. To repeat, rules for dis-

ciplinary proceeding are to be submitted to Judge Motley within a certain time period, and if her direction stands, and such is done the new rules should also be submitted to me for approval in these actions. I also find that the interference with the attorney-client relationship involving both Wright and Mosher violated their due process rights. As Judge Motley did, I adopt the view of Judge Keating, dissenting for the three dissenters in Brabson v. Wilkins, 19 N. Y. 2d 433 (1967). There is no support for the fears that unhampered lawyer-prisoner correspondence may endanger security. There are rules for confinement to the observation cell (Ex. 22), particularly covering confinement by an employee during night periods to such cells, but these rules should be redrafted and submitted to me for approval being considered a direct issue involved here.

I should emphasize again that I am not inclined to make this decision a blunderbuss attack upon the New York State Prison system because such attack is not warranted. New York has adopted new legislation, its prisons have inaugurated new programs for guidance and counselling, and judicial intrusion I think should be cautious and restrained at this stage when apparently good faith effort is underway in New York to correct the conditions I find wrong that existed in 1965 and 1966. I do not intend, as the determined lawyers for the plaintiffs desire by their submission, to allow this decision that is confined to the extreme circumstances concerning Wright and Mosher to be used as a launching pad to correct every administraive and confinement fault in the New York State Prison system. Those pleas should be pressed upon the Governor, Attorney General, Correction Commissioner, and proper legislative Committees of New York. The basis for any intrusion here at all is restricted to the power of federal courts to intrude when civil rights are violated by federal constitutional deprivations or violations. I seek to

impose self-restraint upon my judicial power as herein I recommend to others who judge. I want the disciplinary administrative personnel who really assume the function of a Judge to so act when hearing charges and make serious decisions that cause severe confinement and resulting loss of other privileges and rights that may affect parole and conditional release. In the main, of course, my finding for Wright and the conclusion that his constitutional rights were violated is based primarily upon the combination of the living conditions that he had to endure for periods of time in 1965 and 1966. At that time there was a design in my judgment to avoid written rule-making in the Clinton segregation unit, to put the rebellious prisoner in the hands of the guards under unsanitary conditions that would make him subservient and break him down into a submissive and conforming attitude that was thought in reasonably good faith, I am sure, as being necessary to maintain security and overall maintenance of discipline. There is no doubt that these motivations became part of the system and were handed down by those who had handled prison inmates for years. Unfortunately, it is true that a number of prisoners remain just as desperate and violent inside as outside a Prison and stern measures must be taken which judgment when necessary I do not intend to challenge. The record here bears out a reluctance, however, to indulge in much rule making for segregation confinement, and the Wardens made rare visits to such area of the prison (R. 1447). Such rules and surprise visits seem essential to insure humane treatment no matter the provocation. To the credit of Warden McMann, he made major corrections in the 4 Segregation Section when certain conditions came to his attention (R. 1448-9).

The money damages to be awarded Wright as seems prevalent in the application of all legal principles in these claims under the Civil Rights statute enters a complicated

phase of judicial writing. Judge Motley covered the leading cases to the date of her decision, May 14, 1970, in Sostre v. Rockefeller, et al., supra. Generally, the compensatory damages are to be governed by federal standards. (42 USCA 1983; Sullivan v. Little Hunting Park, Inc., 396 U. S. 229, 239; Pierson v. Ray, 386 U. S. 547; Basista v. Weir, 3 Cir., 340 F. 2d 74, 87). Supreme Court Justice Brennan expanded upon these writings, concurring in part and dissenting in part, in Adickes v. Kress & Co., —— U. S. ——, June 1, 1970, stating that the federal courts are duty-bound to enrich the jurisprudence of § 1983 by looking to remedies of the State wherein they sit. The practical guide I think is contained in Monroe v. Pape, 365 U. S. 167, 187 to the effect § 1983 should be read against the background of tort liability that makes a man responsbile for the natural consequences of his actions. Conventional principles of damages, in my experience never too difficult to apply, fit the situation here. Chief Judge Lumbard recently with ease used the traditional elements of compensatory damage while sitting as a District Judge in Connecticut in Arroyo v. Walsh, et al., Civ. Action No. 13, 100, awarding $2500.00 damages for alleged excessive force by police in making an arrest.

I do not minimize the discomfort Wright had to undergo. However, we do not have the usual propositions of doctor bills, loss of wages, physical injury and possible future physical impairment. Wright is a big, strapping man, and although he testified that under the rigors of his confinement in the cold when nude he lost weight, there is no support for that except his testimony and I refuse to so find. Loss of sleep is believable under the conditions I find existed for periods of the night hours. There are no medical records to substantiate his claims of swollen legs and so forth (R. 80-87). The doctor did pass his cell daily and there is no record I am aware of with such complaints.

Appendix B.

I award no punitive damages because such are justified only as a retributive or deterrent measure. Green v. Wolf Corp. 2 Cir., 406 F. 2d 291. Also, to be applied is the statement of Justice Brennan in Adickes, supra, that a defendant, such as the Warden here, must act with actual knowledge he was violating a right secured by the Constitution and laws or acted with reckless disregard of whether he was thus violating such right. Although I do not find sufficient to uphold the good faith or probable cause defense, there is not enough in my judgment to find deliberateness or recklessness on the Warden's part to award punitive damages. Further, because of the examples I have noted of correction and improvement in New York prison conditions that relate to issues of this kind, and the legislative and correctional attitude to update and improve to conform to modern penological surveys and studies, there is no need in my judgment for deterrent measures. The dark cells are changed to such extent that their use although necessary in certain circumstances would be minimal. Neither Wright or Mosher were ever so confined. The injunctive relief I grant, and in each action, the attorneys for each plaintiff, have submitted separate elaborate decrees for detailed relief with many similar provisions. Any decree of injunctive relief should be limited to the relief granted specifically in this decision, and should not entail or cover projections for other relief that I do not decide herein.

My conclusions of law for Wright are that the Court has jurisdiction; his confinement under the conditions as described herein in 1965 and 1966 in 4 Segregation Unit at Clinton Prison, Dannemora, N. Y., constituted cruel and inhuman punishment in violation of the Eighth and Fourteenth Amendments; that rules are to be submitted as herein noted that will limit carefully confinements to the "observation cell" to which Wright was confined; permit legal assistance among inmates to each other, and prohibit

interference with attorney-client correspondence. That plaintiff Wright is entitled to compensatory damages in the amount of $1500 together with the costs and expenses set forth in plaintiff's Wright proposed decree in paragraph VII. Jurisdiction shall be retained to insure compliance with the directions herein regarding promulgation and enforcement of proposed rules to attain these purposes. The time limits for submission of new rules and regulations that pertain to the matters herein where I made express direction shall be submitted to the Court and served within 30 days on the paintiffs' attorneys, who shall have ten days to object with right to hearing to be fixed by the Court, if necessary. I have tried to make clear that the time period for proposed new rules and regulations for disciplinary hearings, their decision, review and appeal shall be geared by New York to the submission at the same time as that fixed by Judge Motley. A decree in conformance herewith, if agreed upon, shall be submitted for signature and filing, and if not so agreed upon, to be settled upon five days notice.

II

Mosher

I have less difficulty with the claim of this plaintiff than with Wright. The claim requests no money damages and ironically at the trial there was not the great complaint by Mosher about living conditions in 4 Section, except, of course, his first confinement there took place in 1967. He was not confined nude nor on his part did he make much during his testimony concerning the heat conditions. Mosher, and I find him a believable witness although obviously explosive and fiery, spent five months in segregation in 1967. He was released in September 1967, and on December 14, 1967, for violation of the same rule was sent

back to segregation under the usual UFO (until further order) indeterminate sentence where he was then confined for another year. During the last segregation confinement, Mosher was kept for five months in the 4 Section, which although improved was still severe in its living conditions (R. 1087-8). The trigger for Mosher's first confinement to segregation that caused the second one, revolved around his failure to sign a so-called "safety sheet" in both instances (R. 1017-8; Ex. 11; 1036-7). This regulation to sign a "safety sheet" was said to be a method to insure that every prisoner read the safety rules before working in the prison shops. I find that Mosher sincerely felt that such document would waive his right to sue the State of New York for damages for personal injuries caused by negligence and that is why he refused to sign (R. 1018-9, 1061, 1077, 1201). The lawyers and I at the trial could not agree as to the legal significance or construction that might be given to the "safety sheet" and the possible extent of waiver of rights, and Warden LaVallee testifying in Court said he would have no objection to addition of words to the sheet that the inmate was not waiving rights for personal injury claims against State (R. 1518-19). More important is the testimony of Warden McMann that he did not believe failure to sign the sheet called for disciplinary action at all (Ex. 3: 28-29). Director Bennett testified the segregation sentence was inappropriate punishment (R. 243-7). Other inmates who refused to sign only lost yard and commissary privileges (Ex. 14: March 28, December 14, 1967). With reliance on this type testimony, I find that the original confinement to segregation of Mosher and its prolongation was grossly disproportionate punishment for the offense committed by him. I also find that procedural safeguards with meaningful review and formal right to appeal in this instance might have averted or corrected this improper punishment. (See Armstrong v. Manzo, 380 U. S. 545, 552; Ex. 2: 77-81, 96-7; Ex. 3: 20, 21). I find

that these confinements to punitive segregation being unconstitutionally disproportionate in the beginning are linked clearly to the later violations in segregation. The connection I find is such that the "good time" lost by Mosher resulting from the first segregation confinement carried through to the other segregation charges and confinement and he is entitled to its restoration. Such total good time loss shall be computed by days recited in the decree to be submitted by Mosher. (See Rodriguez v. McGinnis, et al., (NDNY), 307 F. Supp. 627; appeal taken for defendants, argued and under consideration by Court of Appeals, Second Circuit). The same ruling rule herein regarding the observation cell and correspondence with an attorney in the Wright discussion apply to Mosher. The procedural considerations that caused Mosher's confinement affect Mosher much more than Wright, and the decree for Mosher to be submitted shall incorporate as acceptable Paragraph 9; subdivisions (b), (c) and (d) of the proposed Mosher decree filed. (See Goldberg v. Kelly, 397 U. S. 254). The time limits are to be the same and should be geared when necessary to the rule and regulation submission requested by Judge Motley. I should note that in this record and in exhibits there is contained the foulest of language. In some parts of our society such language is the popular one of the day. I do not intend to enter that thicket. As one guard stated, guards and inmates indulge in expletives, and I believe the language is choice on both sides. I can only recommend for reading an article in the FBI Law Enforcement Bulletin, January 1970, entitled "Explosive Words and Phrases". The gist is law enforcement officers particularly must train themselves to exercise superior restraint and patience no matter the provocation.

My conclusions of law are there is jurisdiction in this Court of the Mosher claim; his Eighth and Fourteenth Amendments constitutional rights were violated by reason

of disproportionate punishment for offenses committed in violation of prison rules; that the "good time" loss resulting from infractions and related ones discussed herein shall be restored; that he is entitled to injunctive relief to the extent only indicated herein. The time limits set in the Wright action apply here. The decree for Mosher should contain the same provisions for award of costs and expenses as in Wright. The decree shall be submitted if consented to, otherwise settled on five days notice.

In conclusion, I must say reaching decision in these actions has been a difficult task. The issues, many of them probably borderline for consideration in a federal court were numerous and filled with legal complications. The consequences of abrupt and arrogant interference had to be weighed and balanced with the compelling interest to uphold federal constitutional rights in accord with modern precepts. The balance must be kept true as Justice Cardozo said, and there must be equal understanding of the prison administration problems as well as those of the inmates. The problems will work out if fairness and firmness become dominant principles in prison discipline, and due regard is given to the immense studies and program recommendations now available as guides.

The exhibits herein, except the five Log Books (Ex. 38, 39, 40, 41, 42), shall be filed with the Clerk of the Court with this decision at Utica, New York. The Assistant Attorney General attaches security importance to the Log Books and they shall be retained in my Chambers at Albany, to be delivered to a representative for the defendants at their convenience.

It is So Ordered.

Dated: July 31, 1970, Albany, New York.

JAMES T. FOLEY,
United States District Judge.

Appendix B.

Memorandum-Decision and Order Entered by Foley, D.J., on August 19, 1970.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION AND ORDER

Aug. 19, 1970

In the above actions, my memorandum-decision and order dated July 31, 1970, after lengthy discussion of the issues, directed in each action that separate decrees be submitted in accordance with my findings and conclusions for signature, if consented to, otherwise to be settled on five days notice.

In each action, Attorney Turner for Mosher and Attorney Friedlander for Wright have submitted decrees with a formal notice of settlement designated for August 12, 1970. I have reviewed the decrees and have made the changes therein that in my judgment bring them into conformance with the rulings I made directly or intended by my expressions in the memorandum-decision and order of July 31, 1970.

The separate original decrees with additions, deletions and certain portions stricken are signed and shall be mailed as of this date to the Clerk of the District Court at Utica for filing. For convenience, a mailing list of the attorneys is herewith furnished and the Clerk is directed after filing of the decrees to mail Xeroxed copies of both to said attorneys and to me for my files at Albany, N. Y.

It is So Ordered.

Dated: August 19, 1970, Albany, New York.

JAMES T. FOLEY,
United States District Judge.

Appendix B.

Decree, dated August 19, 1970 (Mosher).

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF NEW YORK.

67-CIV-174

UNITED STATES OF AMERICA ex rel. ROBERT MOSHER,

vs.

HON. J. EDWIN LA VALLEE, Warden of Clinton Prison, Dannemora, N. Y.,

Defendant.

DECREE

This action having come on for trial before the Court, sitting without a jury, and the issues having been duly tried and decision rendered on July 31, 1970, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

I. *Injunctive Relief*

Defendant, his agents, employees, successors and all others under his control or acting in concert with him, are hereby enjoined as follows:

A. *Disciplinary Procedures*

1. Defendant shall not confine plaintiff to punitive segregation or subject him to any other punishment as a result of which he may lose accrued "good time" credit or be unable to earn "good time" credit without affording him at least the following rights:

(a) Adequate prior notice of the charge against him and the possibility that he may be sent to segregation or lose good time.

(b) Fair hearing procedures, including the right to appropriate representation, to present his version of the facts, to challenge the facts constituting the charge, to call witnesses where the facts are disputed and to have an adequate record made of the proceedings.

(c) Where the decision is made to send plaintiff to segregation, an indeterminate sentence shall not be imposed but plaintiff shall be told the exact length of his term; in addition, the reasons for such decision shall be recorded and the decision shall be reviewed by the Warden before it becomes final. A regular and formal means of administrative appeal shall be provided from the decisions of the disciplinary board and the Warden.

2. Defendant shall promulgate and act in accordance with reasonable rules and regulations governing prison disciplinary proceedings. Defendant shall submit proposed rules and regulations to the Court and counsel for plaintiff at the same time as the Department of Correction submits such rules and regulations to the District Court for the Southern District of New York in *Sostre* v. *Rockefeller,* 68 Civ. 4058. Plaintiff's attorney shall have 10 days thereafter to submit and serve objections, if any, to the rules and regulations. If objections are presented, they may be considered at a hearing to be fixed by the Court.

B. *Restoration of Good Time*

Defendant shall forthwith restore to plaintiff 616 days of good time, comprising 440 days of accrued good

time taken from plaintiff in disciplinary proceedings during confinements to punitive segregation in 1967 and 1968 and 176 days which plaintiff was barred from earning because of such confinements.

C. *Observation Cells*

1. Plaintiff shall not be confined in any psychiatric observation cell for disciplinary purposes or without psychiatric justification.

2. Defendant shall promulgate and act in accordance with reasonable rules and regulations governing (a) the conditions which prevail in psychiatric observation cells and (b) the procedures used in determining whether to confine an inmate in such a cell. Defendant shall submit proposed rules and regulations to the Court and counsel for plaintiff within 30 days after the entry of this decree. Plaintiff's attorney shall have 10 days thereafter to submit and serve objections, if any, to the rules and regulations. If objections are presented, they may be considered at a hearing to be fixed by the Court.

D. *Attorney-Client Correspondence*

Defendant shall not censor or interfere in any way with any correspondence between plaintiff and his attorney.

E. *Inmate Legal Assistance*

Defendant shall permit inmates to render legal advice or assistance to each other. Defendant may, however, promulgate reasonable rules and regulations governing the time, place and manner of rendering legal assistance among inmates.

Appendix B.

II. *Costs and Expenses*

The costs of this action shall be borne by defendant. The costs shall include (a) the costs of the depositions introduced in evidence, (b) the traveling expenses and reasonable fees of the two expert witnesses who testified on behalf of plaintiff, and (c) the reasonable traveling expenses of appointed counsel for the purpose of taking depositions and attending the trial. The parties are directed to attempt to agree on the amount of such costs; application to the Court may be made if agreement cannot be reached.

III. *Retention of Jurisdiction*

The Court retains jurisdiction of the case for the purpose of supervising compliance with this decree.

Dated: August 19, 1970, Albany, N. Y.

JAMES T. FOLEY,
United States District Judge.

Approved as to form:

LOUIS J. LEFKOWITZ, Attorney General
by Timothy F. O'Brien,
Attorney for Defendant.

WILLIAM BENNETT TURNER,
Attorney for Plaintiff.

Appendix B.

Decree, dated August 19, 1970 (Wright).

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

Civil No. 66-CV-77

LAWRENCE WILLIAM WRIGHT,

Plaintiff,

vs.

HON. DANIEL MCMANN, WARDEN OF CLINTON PRISON, DANNEMORA, NEW YORK,

Defendant.

DECREE

This action having come on for trial before the Court, sitting without a jury, and the issues having been duly tried and decision rendered on July 31, 1970, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

I. *Injunctive Relief*

Defendant, his agents, employees, successor and all others under his control or acting in concert with him, are hereby enjoined as follows:

A. *Operation of Segregation Cell Block*

1. Plaintiff shall not be confined to punitive segregation and its use by defendant or his successor is hereby enjoined until the defendant shall promulgate and insure enforcement of rules and regulations which shall provide for the following:

Appendix B.

(a) Facilities in segregation cells which shall be sufficient to safeguard the health and physical well-being of the occupants, which facilities shall include at a minimum adequate furnishings, and sanitary facilities and implements.

(b) Provisions to insure maintenance of adequate heat and ventilation in the segregation cell block.

(c) Adequate clothing shall be provided for occupants. Enforced nudity solely as a disciplinary measure shall be forbidden.

(e) Occupants shall not be deprived of eye-glasses, dentures or of any other prosthetic necessary for health or comfort, as a disciplinary measure.

(f) Occupants shall be granted the right to correspond freely with their attorneys, such correspondence shall not be censored.

(h) Regular inspection of the segregation cell block by adequately trained supervisory personnel, along with an established routine for unannounced inspection visits by such personnel to the segregation cell block.

(j) Uniformity of reports concerning the day to day operation of the segregation unit, such records to be maintained in conformity with acceptable standards which shall guarantee the reliability and accuracy of the reports.

B. *Procedures for Imposition of Sentence to Punitive Segregation*

1. Defendant or his successor shall not confine plaintiff to punitive segregation or any similar type of punishment resulting in his isolation from the prison population and

loss of accrued good-time credit or inability to earn good-time credit without affording him at least the following rights:

(a) Adequate prior notice of the charge against him and the possibility that he may be sent to segregation or lose good time.

(b) Fair hearing procedures, including the right to appropriate representation, to present his version of the facts, to challenge the facts constituting the charge, to call witnesses where the facts are disputed and to have an adequate record made of the proceedings.

(c) Where the decision is made to send plaintiff to segregation, an indeterminate sentence shall not be imposed but plaintiff shall be told the exact length of his term; in addition, the reasons for such decision shall be recorded, and the decision shall be reviewed by the Warden before it becomes final. A regular and formal means of administrative appeal shall be provided from the decision of the disciplinary board and the Warden.

2. Defendant shall promulgate and act in accordance with reasonable rules and regulations governing prison disciplinary proceedings. Defendant shall submit proposed rules and regulations to the Court and counsel for plaintiff at the same time as the Department of Correction submit such rules and regulations to the District Court for the Southern District of New York in *Sostre* v. *Rockefeller,* 68 Civ. 4058. Plaintiff's attorney shall have 10 days thereafter to submit and serve objections, if any, to the rules and regulations. If objections are presented, they may be considered at a hearing to be fixed by the Court.

Appendix B.

C. *Observation Cells*

1. Plaintiff shall not be confined in any psychiatric observation cell for disciplinary purposes or without psychiatric justification.

2. Defendant shall promulgate and act in accordance with reasonable rules and regulations governing (a) the conditions which prevail in psychiatric observation cells and (b) the procedures used in determining whether to confine an inmate in such a cell. Defendant shall submit proposed rules and regulations to the Court and counsel for plaintiff within 30 days after the entry of this decree. Plaintiff's attorney shall have 10 days thereafter to submit and serve objections, if any, to the rules and regulations. If objections are presented, they may be considered at a hearing to be fixed by the Court.

D. *Inmate Legal Assistance*

Defendant shall permit inmates to render legal advice or assistance to each other. Defendant may, however, promulgate reasonable rules and regulations governing the time, place and manner of rendering legal assistance among inmates.

II. *Compensatory Damages*

Defendant shall pay to the plaintiff the sum of $1,500.00 compensatory damages.

III. *Costs and Expenses*

The costs of this action shall be borne by defendant. The costs shall include (a) the costs of the depositions introduced in evidence, (b) the traveling expenses and rea-

sonable fees of the two expert witnesses who testified on behalf of plaintiff, and (c) the reasonable traveling expenses of appointed counsel for the purpose of taking depositions and attending the trial. The parties are directed to attempt to agree on the amount of such costs; application to the Court may be made if agreement cannot be reached.

IV. *Retention of Jurisdiction*

The Court retains jurisdiction of the case for the purpose of supervising compliance with this decree.

Dated: August 19, 1970, Albany, N. Y.

JAMES T. FOLEY,
United States District Judge.

APPENDIX C

Opinion of the United States Court of Appeals for the Second Circuit, dated December 19, 1967.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LAWRENCE WILLIAM WRIGHT,

Appellant,

against

DANIEL MCMANN, as Warden of Clinton State Prison,

Appellee.

Docket No. 31023
Argued Nov. 24, 1967
Decided Dec. 19, 1967

Before LUMBARD, Chief Judge, KAUFMAN and FEINBERG, Circuit Judges.

IRVING R. KAUFMAN, Circuit Judge:

We are called upon to decide whether allegations contained in a complaint filed by an inmate in a state prison, if true, evidence treatment constituting "cruel and unusual punishment" in violation of the Eighth Amendment of the Constitution of the United States.

Lawrence William Wright, an inmate of Clinton State Prison at Dannemora, New York,[1] appeals from a dis-

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* This case is reported at 387 F.2d 519.

[1] Appellant currently is serving an indeterminate sentence of from one day to life, following a 1963 conviction for certain sexual offenses. See Peeople v. Wright, 22 A.D.2d 754, 253 N.Y.S.2d 653 (4th Dept. 1964), affirmed, 16 N.Y.2d 736, 262 N.Y.S.2d 113 (1965), cert. denied sub nom. Wright v. New York, 384 U.S. 972, 86 S.Ct. 1864, 16 L.Ed.2d 683 (1966).

missal of his complaint without a hearing by the District Court for the Northern District of New York, Brennan, J., 257 F.Supp. 739 (N.D.N.Y.1966). The complaint, brought under the Civil Rights Act[2] and seeking an injunction and $10,000 damages for alleged violations of rights secured to Wright by the Constitution of the United States, was dismissed on the grounds that it failed to make a sufficient showing of the denial of Wright's constitutional rights, or, alternatively, that Wright's remedy, if any, lay in the New York courts. We reverse and remand to the District Court.

I.

The complaint (prepared by appellant without the formal assistance of counsel) alleges[3] that on February 18, 1965, the Deputy Warden, acting on behalf of Warden McMann, the defendant, placed Wright in the solitary confinement unit of the prison for an alleged violation of a prison regulation. The core of Wright's charge seems to be based on the claim that upon reception in solitary confinement, he was placed first in what is known in prison jargon as a "strip cell," where all sorts of cruelties were visited upon him. The conditions to which Wright allegedly was subjected in this cell are best described in his language:

> [T]he said solitary confinement cell wherein plaintiff was placed was dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human ex-

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[2] This suit is brought under 42 U.S.C. §§ 1981, 1983, 1985(3). Jurisdiction is based on 28 U.S.C. § 1343.

[3] Of course, on appeal from the granting of a motion to dismiss, we must accept the allegations in the complaint as true. Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964).

cremental residue superimposed thereon; plaintiff was without clothing and entirely nude for several days [elsewhere said to be 11 days] until he was given a thin pair of underwear to put on; plaintiff was unable to keep himself clean or perform normal hygienic functions as he was denied the use of soap, towel, toilet paper, tooth brush, comb, and other hygienic implements and utensils therefore; plaintiff was compelled under threat of violence, assault or other increased punishments to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 A.M. to 10:00 P.M. every day, and he was not permitted to sleep during the said hours under the pain and threat of being beaten or otherwise disciplined therefore; the windows in front of his confinement cell were opened wide throughout the evening and night hours of each day during subfreezing temperatures causing plaintiff to be exposed to the cold air and winter weather without clothing or other means of protecting himself or to escape the detrimental effects thereof; and the said solitary confinement cell was used as a means of subjecting plaintiff to oppression, excessively harsh, cruel and inhuman treatment specifically forbidden by the Eighth Amendment to the United States Constitution. (Complaint, ¶ 12.)

In other filed papers Wright states that this "strip cell" was completely barren of furniture with the exception of a sink and toilet. He goes on to state that he was forced to sleep completely nude on the cold rough concrete floor and that the cell was so cold and uncomfortable that it was impossible for him to sleep for more than an hour or two without having to stand and move about in order to keep warm. He adds that food was served to him in bowls placed on the floor of his cell and that he

was forced to handle and eat his rations without even the semblance of cleanliness. He describes the cell as fetid and reeking from the stench of the bodily wastes of previous occupants which he says covered the floor, the sink, and the toilet.

Wright was continuously kept in this cell until March 23, 1965—a total of 33 days. A year later, he again was placed in a "strip cell," this time for 21 consecutive days, for violating a prison rule.[4]

II.

Until recently the federal courts refused to review charges instituted under the Civil Rights Act and arising out of state prison disciplinary procedures. The prisoners, instead, were left to pursue whatever remedies were available in the state courts.[5] The oft repeated reasons

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[4] What that rule is, we are not told. Wright's *pro se* brief on appeal states that he received no advance notice from the prison authorities of the charges against him, and was not permitted to call witnesses, to confront his accusers, or to speak or defend himself in any manner.

Wright claims also that he was assaulted by various prison guards in the course of being placed in the "strip cell," and that while in the cell he was not permitted to possess his personal Bible and prayer books nor to see the prison chaplain or Episcopal minister. In addition, he states that for several months he was not permitted to attend Sunday Protestant church services held for the benefit of the inmates. And, according to him, the Warden maliciously placed him in a psychiatric observation cell from April 12 to April 15, 1965, to deter him from making complaints to judicial and other authorities. Lastly, Wright alleges that he was deprived of all his law books and legal materials for a short period of time, and that some of these materials were withheld from him throughout the entire period of his first confinement in the "strip cell," although he was then engaged in appealing his conviction.

[5] See cases cited in Pierce v. LaVallee, 293 F.2d 233, 234-235 (2d Cir. 1961).

used to justify this result were (a) that the Eighth Amendment's prohibition against cruel and unusual punishment did not apply to the states, (b) a reluctance to interfere in the internal discipline of state prisons, and (c) the need to utilize state remedies in the first instance. See Redding v. Pate, 220 F.Supp. 124, 126 (N.D.Ill.1963).

Recent decisions, however, have demonstrated a sharp alteration in the judicial attitude toward these rationales and today the older cases retain little vitality. Indeed, there is no longer any question that a state prisoner may bring an action under the Civil Rights Act. Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964). Any lingering uncertainty over the applicability of the Eighth Amendment to the States was laid to rest by Robinson v. State of California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). And, while federal courts are sensitive to the problems created by judicial interference in the internal discipline of state prisons, in appropriate cases they will not hesitate to intervene. Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Howard v. Smyth, 365 F.2d 428 (4th Cir.), cert. denied, 385 U.S. 988, 87 S.Ct. 599, 17 L.Ed.2d 449 (1966); Jordan v. Fitzharris, 257 F.Supp. 674 (N.D.Cal.1966); Fulwood v. Clemmer, 206 F.Supp. 370 (D.D.C.1962); Talley v. Stephens, 247 F.Supp. 683 (E.D. Ark.1965).

The harshest blow to the old "hands-off" doctrine was struck by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). There, in an action under the Civil Rights Act to recover money damages against city police officers for violating rights secured by the Fourteenth Amendment, the Court held that exhaustion of state remedies was not a condition precedent to accepting jurisdiction. Any remaining belief in the vitality of the exhaustion principle was dispelled when the concurrent jurisdiction of the federal courts in cases under the Act was reaffirmed in clear

terms in McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963). The Court quoted with approval the language of Judge Murrah in Stapleton v. Mitchell, 60 F.Supp. 51 (D.Kan.1945): "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." Id. 373 U.S. at 674, 83 S.Ct. at 1437, n. 6. It is appropriate to note. however, that recently we had occasion to observe that the Supreme Court did not intend *Monroe* and *McNeese* to abrogate the historic principle that federal courts will not entertain a suit in equity when "plain, adequate and complete" remedy may be had at law. Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967). Of course, *Monroe* settled beyond cavil that exhaustion is not required when only legal relief is sought. And, in any event, in this suit for both legal and equitable relief it is only too clear that New York's remedies are inadequate.[6]

Indeed, until relatively recently it was clear that Wright could not even have prosecuted a claim in a New York Court because New York's civil death statute[7] imposed a complete bar to suits by prisoners while incarcerated. See, e.g., Green v. State of New York, 278 N.Y. 15, 14 N.E.2d 833 (1938); Burns v. City of New York, 21 A.D. 2d 767, 250 N.Y.S.2d 680 (1st Dept. 1964). Since the

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[6] Various descriptions of "adequate" have been given, although in somewhat different contexts: "adequate in theory" and "available in practice," Monroe v. Pape, supra, at 183, 81 S.Ct. 473: "plain, adequate and complete," Potwora v. Dillon, supra; "plain, speedy, and efficient," American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, proposed 28 U.S.C. § 1371(c) (3) (Tent. Draft No. 4, 1966).

[7] Formerly § 510 of the Penal Law; now § 79 of the Civil Rights Law, McKinney's Consol. Laws, c. 6.

amendment of section 6-b of the Correction Law[8] in 1962 McKinney's Consol. Laws, c. 43, a right of action (with leave of a Supreme Court Judge) is afforded for the recovery in the New York Court of Claims of damages resulting from injuries inflicted by an employee or officer of a state prison.[9] But the Court of Claims possesses limited jurisdiction and may award only money damages. New York Constitution, Art. 6, § 9. Section 6-b thus is of no aid to Wright in his quest for an injunction to prevent a recurrence of the brutalities he charges. And money damages are small consolation for a man serving a potentially long sentence and complaining of debasing prison conditions which he endured and fears he might have to endure again.

We are told that the so-called Black Muslim cases[10] suggest another possible remedy in the state courts, for in those cases prisoners succeeded in proceedings under Arti-

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[8] Section 6-b now provides:

No civil action shall be brought in any court against the commissioner * * * of correction or an officer or employee of a state prison * * * in his personal capacity, for alleged damages because of any act done or failure to perform any act, while discharging his official duties, without leave of judge of a supreme court, first had and obtained. Any such officer or employee in any such action shall not be liable for damages if he shall have acted in good faith, with reasonable care and upon probable cause.

Any just claim for damages against such commissioner, officer or employee for which the state would be legally or equitably liable, shall be brought and maintained in the court of claims as a claim against the state.

[9] This assumes that § 6-b supersedes *pro tanto* the civil death statute, a matter on which the New York courts have not ruled. Indeed, we are not referred to a single instance in which this section was utilized.

[10] Shaw v. McGinnis, 14 N.Y.2d 864, 251 N.Y.S.2d 971, 200 N.E.2d 636 (1964); Brown v. McGinnis, 10 N.Y.2d 531, 225 N.Y.S.2d 497, 180 N.E.2d 791 (1962).

cle 78 of New York's former Civil Practice Act[11] for mandamus to compel prison authorities to comply with section 610 of the Correction Law guaranteering religious freedom to prisoners. Thus, the Attorney General argues that since Article 78 proceedings are available to enforce compliance with statutory duties, Wright has an effective remedy. He suggests that Wright should be compelled to bring such a proceeding to enforce section 139 of the Correction Law which forbids prison officials from using unnecessary force. But our answer to this is that an Article 78 proceeding could not provide complete relief because Wright's charges are much broader than a mere claim of unjustifiable assault by a prison official.[12]

We are not unmindful of Art. 1, Sec. 5 of New York's Constitution, which forbids cruel and unusual punishment. But we have not been cited to any case, nor has our independent research disclosed any, in which an inmate has challenged prison conditions under this provision. And, it is not clear that an adequate procedure is available in New York to enforce whatever rights are guaranteed under this provision.[13]

The Attorney General of New York has advised us that he would not oppose upon jurisdictional grounds any relief which Wright might seek in the New York Courts.

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[11] This provision is similar to Article 78 of New York's present Civil Practice Law and Rules.

[12] In addition, we have been cited to no case nor have we uncovered any in our research in which a proceeding was brought under Article 78 to force compliance with § 139. This remedy is too nebulous for us to say it is clearly available.

[13] What procedure was employed in Brabson v. Wilkins, 45 Misc.2d 286, 256 N.Y.S.2d 693 (Sup.Ct.1965), modified, 25 A.D.2d 610, 267 N.Y.S.2d 580 (4th Dept. 1966), affirmed, 19 N.Y.2d 433, 280 N.Y.S.2d 561, 227 N.E.2d 383 (1967), does not appear from the reports, although a claim of "cruel and inhuman" medical treatment was considered.

However, we do not understand the Attorney General's position to be that Wright is clearly afforded an adequate remedy under the cases and statutes that have been cited. In any event, jurisdiction is not conferred by the failure of the Attorney General to object.

Accordingly, it seems to us that the New York Courts would conclude that they lack jurisdiction over Wright's prayer for injunctive relief. And so we have grave doubt as to the existence of a state remedy adequate in either theory or practice. See McNeese v. Board of Education, supra, 373 U.S. at 674-676, 83 S.Ct. 1433.

III.

We turn now to the abstention doctrine which has been urged upon us and which we believe has little relevance to this case. Cf. Potwora v. Dillon, supra at p. 86 of 386 F.2d n. 5. The principle—which occasionally is confused with the "exhaustion of state remedy" tenet—was first fashioned in an opinion by Mr. Justice Frankfurter, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and was designed to avoid needless constitutional adjudication. Moreover, if appropriately applied it showed due regard by the federal courts for the sovereignty of the states.

But we cannot ignore that its application gives rise to some sacrifice of the individual's right to federal adjudication, see Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv.L.Rev. 604, 605, 606 (1967) (hereinafter Note, Federal-Question Abstention), and the latest pronouncement on the subject by the Supreme Court emphasizes that the doctrine is to be applied "only in narrowly limited 'special circumstances.'" Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, United States v. Livingston, 179 F.Supp. 9, 12-13 (E.D.

S.C.1959), affirmed, 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960), and quoted with approval in Zwickler v. Koota, supra, 389 U.S. at p. 244, 88 S.Ct. at 397; Note, Federal-Question Abstention, supra, especially at 604 n. 3.

While the doctrine has not been entirely abnegated and instances may still arise in which it will be appropriate, see Harrison v. NAACP, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959); Railroad Comm'n v. Pullman Co., supra,[14] it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention, e. g., McNeese v. Board of Education, supra, 373 U.S. at 673-674, 83 S.Ct. 1433. See Note, Federal-Question Abstention, supra at 607-608. And, in the instant case "the federal right [is not] in any way entangled in a skein of state law that must be untangled before the federal case can proceed." McNeese v. Board of Education, supra, 373 U.S. at 674, 83 S.Ct. at 1437. Indeed, the objectives of the Civil Rights Act would be defeated if we decided that this federal claim grounded on an alleged violation of the federal constitution would have to stagnate in the federal court until some nebulous or nonexistent remedy was pursued like a will-o'-the-wisp in the state court. See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 440 (1964).

The Task Force Report on Corrections of the President's Commission on Law Enforcement and Administration of Justice, cited in our Brother Lumbard's separate concurring opinion, articulates precisely why we are compelled to act in an area so peculiarly within the concern of the states. Recognizing our duty not to require Wright

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[14] As we said in Powell v. Workmen's Compensation Bd., 327 F.2d 131, 135-136 (2d Cir. 1964), "these were cases * * * designed to stay federal injunctive relief pending clarification of state law by its authorized expositors."

to seek relief in the state courts and not to abstain, we turn to the merits of his Eighth Amendment claim.

IV.

Historically, the Eighth Amendment's ban on cruel and unusual punishment was aimed at preventing a recurrence of torture and barbarous punishments, such as pillorying, disemboweling, decapitation, and drawing and quartering—all too prevalent during the reign of the Stuarts. Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv.L.Rev. 635, 636-637 (1966). By the nineteenth century the provision was believed to be virtually obsolete because the punishments sought to be exterminated had long passed. In 1910, however, the Supreme Court revitalized the prohibition against cruel and unusual punishment. Noting that a "principle, to be vital, must be capable of wider application than the mischief which gave it birth," the Court held that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 373, 378, 30 S.Ct. 544, 551, 553, 54 L.Ed. 793 (1910).

We have no hesitancy in holding that the debasing conditions to which Wright claims to have been subjected, and recited in part I of this opinion, would, if established, constitute cruel and unusual punishment in violation of the Eighth Amendment. They offend more than "some fastidious squeamishness or private sentimentalism." Rochin v. People of California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). Indeed, the Assistant Attorney General of New York with commendable candor conceded during argument before us that the conditions, if they were as Wright alleged, were "terrible" and "should not be permitted to exist."

Appendix C.

While the disciplinary policies of the federal prisons would not necessarily have a bearing, *ipso facto*, in determining whether state prison authorties have so exceeded the bounds of propriety as to have violated the Eighth Amendment, it is of some interest that the directives of the United States Bureau of Prisons on the treatment of prisoners in solitary confinement do not permit the conditions Wright alleges. They require that "the quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times"; an inmate can be deprived of clothing only when prescribed by the Chief Medical Officer for medical or psychiatric reasons; and toilet tissue, tooth brush, comb, etc. are not to be denied a segregated inmate. United States Bureau of Prisons, Policy Statement 7400.5, appendix A, p. 2 (November 28, 1966).

We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper.[15] The subhuman conditions alleged by Wright to

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[15] The Warden's answer states that "A strip cell is a necessary part of prison discipline owing to the fact that a prisoner when being punished for breach of prison discipline is placed in solitary confinement or segregation, he often becomes violent and destroys property, tears the cell up, sets fires and otherwise conducts himself as to be dangerous to himself and others. The strip cell is only used to avoid the dangerous consequences of placing a prisoner in a segregated area immediately upon his being sentenced to such punishment." But apparently no determination was made that this *particular* prisoner was or would have become violent. Indeed, the Warden's answer admits that "The treatment of Wright was strictly routine treatment for a violation of prison discipline * * *."

We do not rule out the possibility that in exceptional circumstances it might be necessary to take from a prisoner all objects with which he could harm himself or others. If such circumstances were present in this case, they may, of course, be brought to the attention of the District Court to which this case is being remanded.

exist in the "strip cell" at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency. Trop v. Dulles, 356 U.S. 86, 100, 101, 78 S.Ct. 590, 597, 598, 2 L.Ed. 2d 596 (1958).[16]

V.

While we recognize that our decision in this case[17] may result in some increase in the filing of similar com-

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[16] Conditions in many respects similar to those alleged here were held to violate the Eighth Amendment in Jordan v. Fitzharris, 257 F.Supp. 674 (N.D.Cal.1966). Chief Judge Harris' comments are relevant here: "when * * * the responsible prison authorities in the use of the strip cells have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene—and intervene promptly—to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States." Id. at 680.

[17] What we have said makes it plain that the dismissal of the complaint must be reversed and the case remanded for a hearing. We do not deem it necessary to adjudicate at this time whether Wright was deprived unreasonably of access to the courts or of the opportunity to exercise his religious beliefs. See Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961). The answers to these questions depend on finding a proper accommodation between two factors—on the one hand, the wide discretion which must be afforded prison officials in coping with the disciplinary problems they inevitably face, and on the other hand, the increasing judicial recognition that prisoners are not wholly bereft of constitutional rights. See United States ex rel. Yaris v. Shaugnessy, 112 F.Supp. 143, 144 (S.D.N.Y. 1953); Note, Constitutional Rights of Prisoners: The Developing Law, 110 U.Pa.L.Rev. 985, 986, 987 (1962). On the mere complaint and answer before us we cannot say whether the deprivations (other than the cruel and unusual punishment claim) to which Wright was subjected were, if true, arbitrary punishments, see Howard v. Smyth, supra, or the result of a proper application of prison discipline.

For example, we can conceive of circumstances that would justify a refusal to permit a particular prisoner to attend a religious service.

(*footnote continued on following page*)

plaints in the district courts, we cannot flinch from our clear responsibility to protect rights secured by the Federal Constitution. United States ex rel. Marcial v. Fay, 247 F.2d 662, 669 (2d Cir. 1957), cert. denied, 355 U.S. 915, 78 S.Ct. 342, 2 L.Ed.2d 274 (1958); Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961); Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961).[18]

The dismissal of the complaint is reversed and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

LUMBARD, Chief Judge (concurring):

I must concur, albeit reluctantly, in the action of the court which requires that the district court hear the charges made in Wright's complaint. The failure of New York to provide a forum whereby the state will listen to

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(footnote continued from preceding page)

See United States ex rel. Cleggett v. Pate, 229 F.Supp. 818, 819-821 (N.D.Ill.1964). It may be more difficult to justify depriving a prisoner of a Bible, prayer book and access to the prison chaplain.

We also note that the withholding of all legal materials from Wright for the first few days of confinement in the "strip cell" may be reasonable, Hatfield v. Bailleaux, 290 F.2d 632, 637-638 (9th Cir.), cert. denied, 368 U.S. 862, 82 S.Ct. 105, 7 L.Ed.2d 59 (1961), but withholding for 36 days materials such as the trial record that might be essential for the prosecution of a pending appeal seems dubious. These matters, however, are for the District Judge to determine after a hearing.

[18] In order that our holding not be misunderstood or distorted, we hasten to add that we have concerned ourselves only with the facts presented on this appeal; and we do not even suggest that all disputes over prison discipline rise to Eighth Amendment proportions. Certainly, we do not intend to interfere with appropriate state prison discipline nor to suggest that district judges should become referees in prisoner-guard disputes of every nature or description Cullum v. California Department of Corrections, 267 F.Supp. 524 (N.D.Cal.1967); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), cert. denied, 376 U.S. 932, 84 S.Ct. 702, 11 L.Ed.2d 652 (1964); Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966).

complaints of those whom it imprisons leaves us no choice but to open the doors of the federal courts to such prisoners who make claims of cruel and oppressive treatment which, if true, would establish violation of constitutional rights. The reasons why the federal courts must act in an area which is so peculiarly the concern of the states, and for which provisions should be made by them, are well set forth in the Task Force Report on Corrections issued in May 1967 by the President's Commission on Law Enforcement and Administration of Justice. At page 13, the Report states, in regard to safeguards for protection of prisoners against "brutal treatment":

> "* * * A fortiori offenders should have recourse against corrupt or brutal treatment and against the deprivation of minimal rights to worship and the like.
>
> "Legal requisites in this area remain almost entirely undefined. Certainly one approach to a sensible reconciliation of interests is through the development of adequate administrative procedures within correctional systems themselves. Hearings involving the offender, review of decisions by persons removed from the immediate situation, explicit policy guidelines and standards, and adequate records to support decisions are examples of lines that should be followed. The adequacy of recourse for grievances against officials should be subject to the oversight of some external authority.
>
> "The continued neglect of this task by corrections may, as it has in the case of police procedures, make it difficult for courts to do anything but write their own rules. The necessity of procedural safeguards should not be viewed as antithetical to the treatment concerns of corrections. The existence of procedures both fair in fact and perceived to be fair by offenders is surely consonant with the 'colloborative regime'

> emphasized as desirable by modern corrections, in which staff and offenders are not cast as opponents but are united in a common effort aimed at rehabilitation. In a prison no less than in society as a whole, respect for and cooperation with authority requires the guaranty of fairness."

It is clear that there is no administrative or judicial body with an unmistakable mandate to entertain an application by Wright for an order that would prevent recurrence of the treatment of which he complains. That the New York Court of Claims with leave of a judge of a supreme court may award damages is not enough. Thus, while all would agree that it is far better that the states should formulate, supervise and enforce their own rules for the treatment of recalcitrant prisoners, we are faced with asking a district court to write some of the rules.

We are not called upon this time to decide whether Wright would be heard upon his constitutional claims in federal court without first applying for statutory relief in a state court if the New York legislature had given to inmates of its prisons the right to apply for injunctive relief against improper treatment. I would hold that if a state made provision for such relief in its courts the federal courts should abstain for a reasonable period to allow the state courts to hear the complaint and take appropriate action. I do not agree that recent decisions of the Supreme Court mandate or were intended to mandate action by federal courts in all cases involving the treatment of prisoners in state institutions, without a suitable period of abstention where state courts are empowered to hear the case and where there is reason to believe that the state would grant relief if the complaint were well founded. The disciplining of state prisoners is so peculiarly a matter in the discretion of the state, and

the possibilities that prisoners will file groundless and numerous complaints in the federal courts are so obvious, that these cases raise "special circumstances" that make it appropriate to treat them as an exception to the caveat or policy against abstention by federal courts. As it is not certain that New York will entertain a request to enjoin improper correctional treatment and it only affords money damages after the fact, the federal courts have a duty to listen and to act if it be shown that constitutional rights are being disregarded.

In fairness to New York we must make it clear that we do not, by our action, credit Wright's charges; we do no more than say that he must be given an opportunity to prove them. The flood of petitions filed by state prisoners is a constant reminder that the great majority of prisoners are prone to make whatever charge they have reason to believe will get them a hearing, with little or no regard for the truth of their allegations or what they may hope to prove.

But courts are established to hear complaints and to listen to all those which may have substance, however small may be the proportion of those which have merit. There is no doubt that Wright was placed in solitary confinement: the only question is whether the condition of that confinement went beyond those limits which are constitutionally permissible. I agree with Judge Kaufman's conclusion that if the allegations in the complaint are proved, Wright has been subjected to cruel and unusual punishment proscribed by the Eighth Amendment. The Attorney General has advised us that whatever may be the truth as to the condition of solitary confinement in a strip cell in 1965 and 1966, such conditions do not now exist. However, under the circumstances of this case Wright is entitled to a hearing in the district court.

APPENDIX D

Memorandum-Decision and Order of Brennan, D.J., dated August 31, 1966, Dismissing Appellee Wright's Complaint.*

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

LAWRENCE WILLIAM WRIGHT,

Plaintiff,

versus

DANIEL MCMANN, as Warden of Clinton State Prison,

Defendant.

Civ. No. 66-CV-77

Appearances:

LAWRENCE WILLIAM WRIGHT, Petitioner Pro Se.

HONORABLE LOUIS J. LEFKOWITZ, Attorney General, State of New York, Attorney for Defendant, Albany, New York.

WILLIAM D. BRESINHAN, Esq., Assistant Atty. General, Of Counsel.

MOTION TO DISMISS COMPLAINT

Submitted July 29, 1966 Decided August 31, 1966

MEMORANDUM DECISION AND ORDER

BRENNAN, District Judge

Defendant moves to dismiss the complaint for failure to state a claim upon which relief may be granted. The

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* This decision is reported at 257 F. Supp. 739.

ultimate question here requires the determination of the legal sufficiency of the use of the Civil Rights Act as the basis of the court's jurisdiction in an action at law by a state court prisoner, based upon alleged mistreatment in the execution of punishment for breaches of rules designed to maintain prison discipline.

This is one of the continuous flood of applications by state prisoners which seek some form of relief, from the federal courts, apparently occasioned by the expanded concept of an individual's constitutional rights as delineated in recent authoritative decisions. That the vast majority of such applications are without merit does not relieve the court from the burden imposed. Rather it creates a situation which threatens to engulf especially small two-judge district courts within whose territorial jurisdiction a large number of state prisoners are confined. Either more rigid guide lines must be furnished to such courts or the practice of a denial without memo or explanation will follow if judicial business is to be performed within a reasonably expedient time period. It is sufficient to refer to the five page opinion of Judge Hall in Roberts v. Barbosa, 227 F. Supp. 20, as an example of the type of action which prompts the above statements. In that litigation, the state-confined plaintiff, in a fifty page complaint, sought a judgment of over $2,500,000 against forty-four defendants, including jailers, judges and jurors, basing his right of recovery upon alleged encroachments upon his civil rights.

It is noted that plaintiffs in this district, similarly situated, are no longer content with a declaration of their rights but additionally seek large money judgments apparently invoking a jury trial with its attendant expense and delay. This strategy may well be designed to avoid the requirement that the state administrative remedies must be exhausted as held in U. S. ex rel. Wakeley v.

Commonwealth of Penn., 247 F. Supp. 7 even though the literal reading of Supreme Court decisions might otherwise indicate. Under such conditions, the appointment of counsel, the procurement of witnesses and the disruption of prison routine pose practical problems where, as here, such a trial must be held at a place two hundred or more miles from plaintiff's place of confinement. The attractiveness of suing one's jailer at the expense of the Government is apparent even if the chance of recovery is small.

In justice to the plaintiff, it should be stated that his complaint, although rather lengthy, may be said generally to be well and neatly prepared and his supporting briefs or memos indicate an understanding of the legal problems presented, together with more than the ordinary legal research to be expected from a layman. This results without doubt from plaintiff's intelligence and experience together with the acknowledged aid of the "Legal Aid Clinic" of Cornell University. Correspondence with the plaintiff also shows a definite waiver of counsel in the matter of this motion similar to plaintiff's like waiver in the Appellate Division in his appeal cited below. The pertinent background of facts is set out below.

Plaintiff is presently confined at Clinton State Prison, a maximum security penal institution located at Dannemora, New York under a sentence of from one day to life, imposed upon his conviction by a jury verdict of three counts of sodomy, two counts of assault and carnal abuse of a child. An eleven year old boy was apparently the complainant. Peo. v. Wright, 16 N. Y. 2d 736. The judgment was affirmed October 29, 1964 with a short memo. Peo. v. Wright, 22 A. D. 2d 754 and by the Court of Appeals on July 9, 1965. Peo. v. Wright, supra. The Supreme Court denied certiorari June 6, 1966. Wright v. New York, 384 U. S. 972.

The present lengthy complaint is summarized as follows. Jurisdiction is based solely upon the provisions of

28 U.S.C. 1343, 42 U.S.C. 1981, 1983 and 1985. Two separate incidents furnish the background for plaintiff's claim for relief. On February 18, 1965, plaintiff was confined in "solitary confinement" upon the direction of the Deputy Warden because of a violation of a prison regulation. In the course of carrying out the order, two named officers of the institution assaulted plaintiff by "slapping, striking and kicking him". Profane language was used by the officers who threatened him with violence and he was placed in a barren, dirty and unsanitary detention cell without clothing "for several days". He was required to remain standing "each time an officer appeared" from 7:30 A. M. to 10:30 P. M. and was subject to cold temperature by reason of the opening of the windows in the area "throughout the evening and night hours". Plaintiff was denied the use of law books and legal documents for six and one-half days and use thereof was limited until March 26, 1965, thereby handicapping the prosecution of pending legal proceedings. His right to attend religious services was denied as was the use of his personal prayer books for an unstated period of time. Letter complaints were written on March 18 and April 5, 1965 to various state and local officers and courts, including the Federal Bureau of Investigation. The action produced no results except that after investigation and interview of the plaintiff, the F.B.I. found no violation of the federal criminal law. On March 18, 1965, a verified document was submitted to this court which requested principally that a warrant issue for the arrest of the Deputy Warden on account of the facts alleged above. The application was denied March 24, 1965. Plaintiff's final allegation as to the occurrence of February 18, 1965 is to the effect that in April 1965 the defendant, in conspiracy with his subordinate officers, caused plaintiff to be confined for three days in an observation cell and subjected to psychiatric examination which resulted in a finding of "no psychosis".

The second incident bears a marked similarity to the above. On February 10, 1966, the plaintiff was again ordered by a Deputy Warden to be subjected to confinement because of an infraction of a prison rule. The physical assault upon his person was limited to his seizure by the collar and being forced against the wall of a building. The conditions of his confinement in the detention cell are alleged as similar to those referred to above. He was deprived of the use of his legal materials for two days and was denied the right to attend religious services.

Injunctive relief and a money judgment in the amount of $10,000 summarize the prayer for relief.

It may be stated at this point that this court is well aware, from previous applications, of the working of prison procedures in imposing and executing the punishment of solitary confinement and segregation upon prison inmates. The court is also aware of the fact that while summary judgment may be granted in this type of action, the allegations of the complaint are subject to factual dispute by the answer and submitted affidavits. It has been determined to reject all affidavits submitted here and limit the decision to the sufficiency of the complaint and thereby avoid the necessity of the repetition of known factual conditions in each of the increasing number of similar complaints.

Interpreting the complaint broadly, as we must, plaintiff's right to recover here appears to rest upon the contentions that he has suffered at defendant's hands, a deprivation of his constitutional rights because of the nature of the punishment imposed and the absence of procedural due process in the determination that plaintiff had in fact violated prison rules or regulations.

Before discussing the above contentions, the apparent invocation of the conspiracy section of the Civil Rights Act will be disposed of. In paragraphs 13 and 28 of the

complaint, plaintiff alleges in a conclusive manner that defendant, in conspiracy with subordinate officers, maintains the "solitary confinement unit" at the prison, as a place of arbitrary punishment and that such a conspiracy existed in the matter of the confinement of plaintiff in an observation cell for psychiatric examination, all of which was intended to harass him in the enjoyment of his constitutional rights. The later claim for relief plainly lacks the factual allegations of overt acts for its support. Perhaps the above statement would apply to the claim as to the use of solitary confinement as a means of punishment. The use of such means is specially provided for by state law. New York Correction Law, Section 140. In any event, the claim does not legally invoke the provisions of 42 U.S.C. 1985(3) since no discrimination against the plaintiff in the matter of the action taken is alleged. Birnbaum v. Trussell, 347 F. 2d 86.

It is beyond argument that federal courts may not interfere by court decree with the internal management of state prisons. This general rule has its exceptions, especially as to the exercise of the rights of prisoners to the practice of their religion and to petition the courts for relief. Cooper v. Pate, 378 U. S. 546; Pierce v. LaVallee, 293 F. 2d 233; Ex Parte Hull, 312 U. S. 546; Dowd v. Cook, 340 U. S. 206. See Matter of Brabson v. Wilkins, 45 Misc. 2d 286 for discussion of prisoner's mailing privileges. No authoritative decision is found however which indicates that the federal courts may assume the role of co-administrator of state prisons in matters of ordinary prison discipline, initiated by the conduct of an inmate.

The present status of the law, as understood from reported decisions, without doubt has prompted state court prisoners to assume that recent decisions have opened the door to federal court appraisal of every infliction of disciplinary punishment imposed. This assumption pro-

ceeds upon the theories that each punishment is prohibited by the Civil Rights Act or is a violation of the Eighth Amendment as to cruel and unusual punishment. The provisions of the amendment is to be measured by "the evolving standards of decency that mark the progress of a maturing society". Trop v. Dulles, 356 U. S. 86. Plaintiff then proceeds to argue that since the Eighth Amendment is applicable to the states (Robinson v. California, 370 U. S. 660), the states' interest in controlling the internal discipline of its penal institutions "must give way when a federally created and protected civil right is allegedly infringed". Redding v. Pate, 220 F. Supp. 124 at 128.

The facts here and the application of the law thereto must be evaluated against the background of the state statutes designed to regulate the control of its prison population and the rules and regulations promulgated in pursuance thereto. New York Correction Law, Section 112. Punshment by solitary confinement to obtain "submission or obedience of any prisoners" is authorized, subject to the daily examination by a physician of the health of the inmate so punished. Correction Law, Section 140. Physical assault upon a prisoner is forbidden unless in self-defense, but officers of the prison are permitted to use "all suitable means . . . to enforce observation of discipline". Correction Law, Section 139. The Commissioner of Correction has the control of state prisoners in the matter of discipline. Correction Law, Section 112. He is directed to make rules as to the discipline of each prisoner for the guidance of officers and employees and may make inquiry into alleged improper conduct on the part of prison personnel. In this state, wardens of its prisons must have a background of qualifications and experience in correctional work. Correction Law, Section 18. Rules and regulations are provided for his guidance as indicated above. Each institution is subject to visita-

tion and inspection at any time by any member of a commission whose duty it is to investigate the management of each institution as to the conduct of its officers, the sanitary condition of its building, the care, treatment and discipline of its inmates. Correction Law, Section 46, 47 and 48. Finally, it would seem that plaintiff, subject to court approval, may bring an action against prison officers or employees because of their action or non-action in the matter here involved. Correction Law, Section 6-b. The time limitation here has not expired. Court of Claims Act, Section 10, subdivision 5. The statutes cited comprise a complete scheme whereby prison discipline is to be maintained and at the same time the humane treatment of inmates is assured. The plaintiff here has failed to test in the courts of the state the sufficiency of same.

It appears from the above that plaintiff's claim here arises because the officers acted not under the authority of state law but in spite of it. The misuse of power, possessed by state authority, is held to be actionable under the circumstances disclosed in Monroe v. Pape, 365 U.S. 167. Plaintiff urges that the above holding applies to matters involving prison discipline. The necessity for the use of punishment as a means to the enforcement of discipline in the management of the internal affairs of prisons is not only recognized by statutes but is supported by an unbroken line of judicial precedents. Plaintiff's contention that recent decisions have rendered such precedents obsolete would seem to lack support.

In 1961, Judge Clark in Pierce v. LaVallee, supra, recognized the existence of a line of cases which held that a state court prisoner, complaining of improper prison treatment, must seek his relief in the state court. The decisions referred to were explained at least in part as not involving the violation of a constitutional right. The repeated citation of such decisions here is unnecessary but it may be

noted that Atterbury v. Ragen, 237 F. 2d 953, which in many respects is similar to this complaint, is frequently cited in subsequent decisions. The holdings referred to above are followed and in fact emphasized as late as March 1966, at least in the Seventh Circuit in Walker v. Pate, 356 F. 2d 502, in which the court indicated that persistent appeals by state court prisoners, seeking relief from prison discipline, would thereafter be disposed of in a summary manner. Such holdings are not limited to the above circuit. Neither are they foreclosed by Supreme Court holdings relied upon by plaintiff. See Kostal v. Tinsley, 337 F. 2d 845, where it was held that solitary confinement may properly be used to enforce prison discipline. See Childs v. Pegelow, 321 F. 2d 487 at 489 and cases cited. Kirby v. Thomas, 336 F. 2d 462; Cole v. Smith, 344 F. 2d 721; Ruark v. Schooley, 211 F. Supp. 921; Threatt v. State of North Carolina, 221 F. Supp. 858; Talley v. Stephens, 247 F. Supp. 683. (The last two cited cases involve the whipping of prisoners apparently authorized by statute or rule.) Temple v. Pergament, 235 F. Supp. 242. In the last cited case, the decisions in U. S. v. Pate, 223 F. Supp. 202 and Redding v. Pate, 220 F. Supp. 124, upon which plaintiff relies, are distinguished. Our own Circuit Court of Appeals apparently has not directly passed upon the question under discussion but its approach thereto seems to be foreshadowed by the following quotation taken from Sostre v. McGinnis, 334 F. 2d 906 at 908—"No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary discipline regime established by prison officials". A quotation from Childs v. Pegelow, supra, then follows and the above quotation continues—"A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline". This quotation is followed by a quote from Price v. Johnson, 334 U. S. 266, 285.

Appendix D.

This court concludes that reported decisions up to date hold that except in extreme cases, the courts will not interfere with the enforcement of rules designed to enforce prison discipline or maintain prison security for the ultimate benefit of both the public and the inmates. The rule is not absolute and is further illustrated by the cases relied upon by the plaintiff. Its elasticity is indicated in a recent decision in our own circuit—Jobson v. Henne, 355 F. 2d 129. The allegations of the complaint here are nothing more than the routine grievances of one who appears to be unable or unwilling to abide by the rules which the great majority of inmates accept and obey as recognized limitations upon their rights as free citizens. Plaintiff makes no specific allegations of injury. Damages are conclusively alleged and appear to be more theoretical than actual. The impediment imposed upon the practice of plaintiff's religion appears to be nothing more than the temporary withdrawal of the accommodations afforded by prison rules during an unspecified time period and due to the punishment status of the plaintiff. That the plaintiff has failed in allegations of the complaint to bring the claim therein within the exceptions to the above general rule seems apparent. Bryant v. Harrelson, 187 F. Supp. 738.

Plaintiff leans rather heavily upon the provisions of the Eighth Amendment which forbids the infliction of cruel and unusual punishment as a further basis for his asserted claim and quotes Justice Douglas in Robinson v. California, supra, at 676, to the effect that punishment out of all proportion to the offense may bring it within the ban of said amendment. No all-inclusive rule may be applied. The facts, circumstances and attitude of the inmate are relevant factors for consideration. The decision in Redding v. Pate, supra, at 128, cited by plaintiff, expresses doubt that the above provision is encompassed within the allegation of the complaint which seeks relief because of

the harshness of prison rules or routine. The amendment was adopted to prevent inhuman, barbarous, or torturous punishment. Black v. U. S., 269 F. 2d 38. The decision in Robinson v. California, supra, however, adds nothing to the obligation of New York courts since the same prohibitory language is found in its constitution. Bill of Rights, Art. 1, Sec. 5. Every punishment in a sense involves cruelty since it imposes by force conditions at odds with the concept of the freedom of the person from all forms of trespass, and freedom of action. More than this is required to violate the Eighth Amendment. Harvard Law Review Jan. 1966, Vol. 79, Number 3. Until an authoritative interpretation may be made in the future, this court is content to hold that the complaint, which lacks allegations of physical injury, shows no such departure from the accepted methods of prison punishment, is insufficient to invoke the constitutional provision under discussion. The contention in itself bolsters the assertion that New York should be first permitted to evolve its own "standards of decency" prior to federal court interference. Such standards may well be more lenient to the prison inmate than would be imposed by a nationwide decree which could do little more than to fix minimum requirements of the rights of prisoners.

Plaintiff's final claim for relief rests upon the contention that he was deprived of procedural due process. Perhaps in the allegations of the complaint such a claim may be found but in any event it is advanced in one of plaintiff's briefs and will be summarily disposed of here.

No claim is made that plaintiff lacked notice of the charge against him and he apparently has forgotten that in his affidavit supporting the application which was denied on March 24, 1965, he affirms that he specifically admitted the infraction of February 18, 1965. The allegation relating to the occurrence of February 10, 1966 is plainly

insufficient as it consists only in the allegation that the proceeding was conducted "without being afforded even the slightest element of due process of law".

This court from past experience knows that the presentation of charges of the breach of prison discipline and the disposition thereof are regulated by rules. Again if same are insufficient, the state should be afforded an opportunity to supply the deficiency. The contention is insufficiently alleged and an appellate court may more appropriately decide to what extent, if any, this court will review the procedures adopted in factually determining a violation of prison rules.

The decision here may rest upon either or both of the following conclusions. (1) The complaint makes no sufficient showing of the denial of plaintiff's constitutional rights. (2) Plaintiff's remedy, if any, lies in the state courts.

The first of the above conclusions rests upon the decisions cited above which deny federal interference in the internal management of state prisons. If the above is held to be in error, then we reach number 2. The second conclusion rests upon the rule that Civil Rights legislation "should be construed so as to respect the proper balance between the States and the federal government in law enforcement". Screws v. U. S., 325 U. S. 91 at 108; Snowden v. Hughes, 321 U. S. 1. The general rule that the internal administration of state prisons is the state's primary responsibility and not a matter of federal intervention is admitted here. It is asserted however that the doctrine of abstention has been completely repudiated by late decisions insofar as actions involving Civil Rights are concerned.

This court adopts the rationale of the decision in U. S. ex rel. Wakely v. Commonwealth of Penn., 247 F. Supp. 7 to conclude that jurisdiction should be refused here in the absence of compelling circumstances showing that state

remedies are ineffective, unduly delayed or subject to prejudice, preventing full relief. See also U. S. ex rel. McCode v. Commonwealth of Penn., 246 F. Supp. 801. In Sostre v. McGinnis, supra, a limited abstention of federal jurisdiction was approved even in an action involving the exercise of religious rights and the decision in Harrison v. N.A.A.C.P., 360 U. S. 167 was cited as indicating an approval of the doctrine in a Civil Rights case.

The landmark cases of Monroe v. Pape, 365 U. S. 167; Lane v. Wilson, 307 U. S. 268; McNeese v. Board of Education, 373 U. S. 668 and Dombrowski v. Pfister, 380 U. S. 479 have not been overlooked. The language of these decisions, dispensing with the requirement that state court procedures must be exhausted prior to the maintenance of federal court action, is broad but has not been applied to actions by state prisoners against their jailers. Such actions, be they in the form of habeas corpus or Civil Rights, possess a background peculiar to the status of the litigants. State action has brought about that status and state authority controls it. State courts should be first given the opportunity to regulate and vindicate that control. None of the three main aims of the Civil Rights Act, as outlined in Monroe v. Pape, supra, is served by denying such opportunity. To hold otherwise "would fly in the face of the experience of the law". U. S. ex rel. Wakely v. Commonwealth of Penn., supra, at 10. The thrust of the decisions of the Supreme Court in Robinson v. California and Trop v. Dulles is directed to require that punishment imposed by a state may not exceed the requirements of our present society. Such requirements are not static. The "progress of a maturing society" is an essential part of the measure thereof. It seems to be thus implied that the state must measure its punishments within constitutional limits by its own standards of decency since society does necessarily mature evenly in a nation as diverse as ours. On the other hand, the benefits of Civil Rights statutes are intended to

be uniform and not to vary from state to state. Basista v. Weir, 340 F. 2d 74. All of the above seems to lead to the conclusion that this type of litigation is not intended to be exempted from the doctrine of the exhaustion of state court remedies.

Undoubtedly the plaintiff may contend that no relief is available to him in the courts of New York. It must be admitted that no precedent is available which clarifies the legal rights of prisoners to relief in New York courts under the circumstances of this complaint. New York, however, has been prompt to implement by statute or judicial decision, federal court holdings, where its inhabitants have been deprived of a constitutional right. Impairment of constitutional rights, imposed upon the plaintiff by prison rule, would seem to be reviewable under the provisions of Article 78 New York C.P.L.R. Matter of Brown v. McGinnis, 10 N. Y. 2d 531; Matter of Shaw v. McGinnis, 14 N. Y. 2d 864. We find no reported decision construing and applying the provisions of Section 6b of the Correction Law, referred to above. Absence of such a precedent however cannot be construed as to destroy the vitality of the section. The above section was apparently intended to exempt a type of meritorious action from the prohibition of Section 510 of the New York Penal Law. New types of litigation may well require a reappraisal of the statute law. In any event, the plaintiff should at least present his contention first to the state courts in furtherance of the well recognized principle of comity. The discussion of the availability of a state remedy may be brought to an end by paraphrasing the language found in Peo. v. Guhr, 5 A. D. 2d 688. We are confident that New York courts will find a way if plaintiff can establish his claim that his Civil Rights have been invaded to afford him adequate relief.

A summary of this decision may be expressed as follows. This court holds that no exceptional circumstances

are shown in the complaint which would exempt this action from the general rule that federal courts will not interfere with the internal management of the state prisons; that the complaint fails to show a violation of plaintiff's constitutional rights afforded him under either the Eighth or Fourteenth Amendments; that plaintiff must exhaust his state court remedies in this type of litigation before this court may assume jurisdiction and there is no showing that such remedies are unavailable or inadequate.

It is concluded that the complaint fails to state a claim upon which relief may be granted and the motion to dismiss same is granted, and it is

So Ordered.

Stephen W. Brennan,
Senior U. S. District Judge.